Benj.n Nudler

REPORTS

OF

THAT REVEREND AND LEARNED

JUDGE,

SIR

HUMPHRY WINCH

KNIGHT;

Sometimes one of the JUDGES of the COURT

OF

COMMON PLEAS:

Containing many Choice Cases, and excellent matters touching Declarations, Pleadings, Demurrers, Judgements, and Resolutions in points of

LAW,

In the foure last years of the Raign of King *JAMES*, faithfully Translated out of an exact french Copie, with two *Alphabetical*, and necessary Tables, the one of the names of the Cases, the other of the principal matters contained in this Book.

LONDON,

Printed for *W. Lee*, *D. Pakeman*, and *G. Bedell*, and are to be sold at their Shops in *Fleetstreet*, 1657.

REPORTS

OF

THAT LEARNED AND LEARNING

JUDGE.

COURTEOUS READER,

THE principal end in publiſhing Books is the profit which redoundeth to others, and what improvement can there be either more noble in it ſelf, or of greater advantage to the receiver then that of knowledge, and eſpecially of the Lawes of this Nation in which you live, and by which your actions ought to be regulated: the ſtudie of other learning being private, fitter for Univerſities, then Common wealths, fuller of contemplation, then experience, and more laudable in Scholers themſelves, then beneficial unto others; if therefore either benefit will prevail with you, or delight perſwade you, then (I beg favour to ſpeak with ſome confidence) you will finde both thoſe deſired motives in this ſolid Book to Court you: the Author of the greateſt part of them was for many years a grave Judge of the Court of Common Pleas, reverend for his learning and integritie, and honourable for his imployment, of whoſe death, and great worth you will finde a deſerved teſtimonie near the end of theſe Collections; ſome eminent and judicious Pen (unhappily by time buried in oblivion) hath made ſome addition of Caſes to our

The death of Juſtice Winch 4. Febr. vide fol. 125.

great Author no leſs quaint, then uſeful, which being found in one entire exact french copie; you have here with all deligence faithfully rendered in Engliſh for publick uſe: touching the errors which may occur in this Tract, be pleaſed to diſtinguiſh, ſome being of more conſequence then others: the firſt you will finde particularly corrected in the uſual place after the end of this Book, and the reſt an eaſie judgement may in Tranſitu *rectifie which is hoped are not many: this copie comming to ſome ingenuous hands, it was thought fit to expedit the printing thereof to prevent other ſpurious Copies in prejudice of the publick, eſpecially at this time wherein the preſs is proſtituted to ſo much ignorance, and lawleſs libertie: and now to ſpeak a modeſt word of the merit of this work, not only as an invitation to the buyer, and for his benefit, but rather with due reſpect to the memory of our Author, who (is hoped) will live in this poſthumous iſſue, and ſurely it is no ſmall prejudice to the profeſſors of Law that the reſt of his labours are abortively ſmoothered. The Caſes herein you will finde well poliſhed in the ſtating, and ſolidly canvaſed in the debating; both the Bench, and Bar of that Court (with leave be it ſpoken) being then as well ſupplied with deep Sages of the Law, as in divers years either before, or ſince: expect matter here, not eloquence, and the grateful nutriment of the underſtanding, rather then the pleaſing condiments of Rethorick to tickle the Phantaſie. Farewel.*

A Table

A Table of the ſeveral names of the caſes contained in this Book.

A

Aylesworth againſt Harriſon 19
A Widdow Archers caſe 20
Allen againſt Brach 27
Avis againſt Genney 65
Adams againſt Ward 90
Auſtin againſt Beadle 113
Aſhley againſt Collins 114

B

Bartlet againſt Bartlet 2
Bull againſt Fankeſter 19
Buckley againſt Simonds 35
Biſhop of Gloceſter againſt Wood 46 57
Batterſeys caſe 48
Bulloign againſt Gervaſe 58
Buckley againſt Simonds 59
Brigs caſe 65
Bret and Ward 70
Bacon againſt Weſton 70
Barley againſt Foſter 71
Boone and the Biſhop of Norwich 72
Blunt and his wife againſt Hutchinſon 73
Bray againſt Sir Paul Tracie 79
Baker againſt Baker 100
Brown and Ware againſt Barker 102
Bubles caſe 103

C

Auditor Curle for words 33 39
Clotworthy againſt Mitchel 49
Counteſs of Berk. againſt Sir Peter Vanlore 77
Cook againſt Cook 90
Crompton againſt Philpot 102
Cooper againſt Edgar 103 104 &c. 115 116

D

Duncombe againſt the Biſhop of Winton 7
Duncombe againſt the Univerſitie of Oxford 11
Davies againſt Turner 18
Dodderidge againſt Anthony 52
Davies Eliz. againſt Hawkins 125

E

Earl of Northumberland and Earl of Devon. 6

Ewer

—Ewer and Vaughan 8
—Empſon againſt Bathurſt 20 50

F

—FLemming againſt Pitman 63
—Foſters caſe 72
—Ferrers againſt Engliſh 73

G

—Goddard againſt Gilbert 10
—Grice againſt Lee 16
—Sir Edward Grubham againſt
— Sir Edward Cook 20 23
—Gratwick againſt Gratwick 23
—Good againſt Bawtrie 34
—Gell againſt white 35
—Gage againſt Johnſon 53
—Graſier againſt wheeler 76
—Good againſt Good 78
—Goldingham againſt Sir John
— Sands 81 88
—Godſals caſe 90
—Gibſon againſt Ferrers 114 120

H

—HArrington againſt Harrington 9
—Harris againſt wiſeman 19
—Doctor Hunt againſt Allen 25
—Hill againſt Waldron 29
—Hoels caſe 30 54
—Harvey againſt the hundred of
— Chelſam 66
—Haſſet againſt Hanſon 66
—Heath againſt Triſt and Cawtrel 73
—Holman againſt Tuke 80
—Hickford againſt Machin 82 83 &c.
—Hickman againſt Sir William
— Fiſh 100
—Holman againſt Sir Thomas
— Pope and his wife 102
—Holbech Sir Thomas againſt Sambeach 102 —
Hilliard and Sanders 109 110 111 —
121 122 —
Holt and Rand againſt Holt 112 —
Hitcham Sir Robert againſt —
Brooks 123 124 —

I

IOhnſon againſt Norway 37 —

K

KIng againſt Bowen 2 —

L

LEwings againſt March 4 —
LLewellings caſe 11 —
Sir Henry Lelloe warden of the —
Fleet 35 —

M

MAior againſt two Bailiffs 16 —
Maps againſt Sir Edward Sidley 22 —
Mabies caſe 23 —
Mackwilliams caſe 41 —
Mankleton and Allen 73 —
Marriots caſe 78 —
Methol againſt Peck 112 —

N

NOrton againſt Lakins 1 —
Napper Sir Robert 74 87 —
Northumberland v. Devon, 6 —

O

Oxford and his wife against Goldington 64
Over and her husband against Tucker 82

P

Potter against Turner 7
Parson and Morlee 19
Pleadal against Gosmore 67 124 125
Potter against Brown 70 89
Priest and King 77
Portington and Beamond 79

R

Reignolds against Pool 1, 44
Rives case 48

S

Sackvil against Earnsby 4
Sir George Spark 6
Savil against Thornton 13
Sir George Stripping in waste 15
Spencers case 57
Sparrow against Sowgate 61
Sheldon against Bret 63
Summers case 66
Stephens and Randal 77
Summers against Dugs 80
Sheis against Sir Francis Glover 100

T

Topping against King 5
Tutter against Frier 7
Trehern against Claybrook 26 69
Thorntons case 63
Theakers case 71
Thorns case 76
Trenchard Sir George against Hoskins 91 92 93

V

Vanheath against Turner 24

W

Waste against Prettie 3
White against Williams 5
Wetherly against Wells 6
Wright against Black 28 54
Whitgift against Sir Francis Barrington 31
Webs against Barlow 62
Sir Michael Wharton and Sir Edward Hide 72
Westley against King 75
Weaver against Best 75
Woodley against the Bishop of Exeter and Manwaring 94 95 96 &c.
Wen against Moore 101

Easter

Eaſter Term. 19. *Jac.*

EASTER TERM,

In the 19. of *KING JAMES* in *COMMON BENCH*.

IT was ſaid by *Warberton Juſtice*, that in the time when Anderſon was chief Juſtice of this Court, that it was adjudged, that where a Coppiholder alleadged a cuſtom within a Mannor to be, that every Coppiholder may cut trees at his pleaſure, that this cuſtome is againſt common Law, and alſo his opinion was, that where a cuſtome was alleadged to be, that if a Tenant in antient Demeſne deviſe his land to another without other words expreſſing his intent, that the deviſee ſhall have the fee ſimple: *Hobert* inclined to this opinion, and by *Hutton* and *Winch* he ſhall have fee by the cuſtome, and accordingly it was adjudged.

Norton againſt *Lakins* Ent. Hill. *Jac.*

NOrton againſt Lakins Ent. Hill. 18. Jac. in debt upon an obligation, the condition was to ſtand to the arbitrement of J. S. and the Defendant pleaded that he made no arbitrement, the Plaintiff ſhewed the award and the breach. And the caſe in effect was, that the Plaintiff and the Defendant put themſelves upon the arbitrement of J. *S.* of all matters between them till the firſt of March 18. Jac. and he made an award that each ſhall releaſe to the other matters and differences between them till the ninth day of March 18. Jac. and it was argued by Serjeant Henden that the award is void, for by their releaſe the obligation upon which this action is brought is diſcharged: but it was ruled to be a good award, for though it ſhall be void for that part of the award, yet it ſhall be good for the reſt; but Winch doubted of the caſe.

Reynolds againſt *Poole*; Ent. Hill. 18. *Jac.* Rot. 641.

Poſt. 44.

REynolds againſt Pool Ent. Hill. 18. Jac. Rot. 641. Reynolds libelled in the ſpiritual Court againſt Pool, for the Tithes of a Park, and Pool prayed to have a prohibition, and he ſhewed that he, and all thoſe whoſe eſtate he had in the Park, had held this as a Park till the 11. of Eliz. at which time it was diſparked, and that time beyond memory &c. the occupiers had uſed to pay to the vicar of the pariſh a Buck in Summer, and a doe in winter in lieu and ſatisfaction of all Tithes due to the Vicar. And it was argued by Serjeant Henden, that this is not a ſufficient cauſe to grant a prohibition, becauſe that now the Park is deſtroyed and ſowed, and ſo the preſcription fails, for it was annexed to the Park: ſecond-

2. *D.* 607. *pl.* 2. 608. *pl.* 6. 7. *Hutt.* 57.

2. *Ban.* 604. *pl.* 3.

Eaſter Term 19. *Jac.*

ly the queſtion is for the Tithes of corn and theſe do appertain to the Parſon and not to the Vicar, and he cited a caſe between Hawk and Collins in this Court, there the preſcription was, that he and all thoſe, whoſe eſtate he had, had uſed to pay to the Vicar a certain thing in lieu and ſatisfaction of all Tithes due to the Parſon, and for this a prohibition was denyed.

Sherley: he had preſcribed that he had uſed to pay this to the Vicar, and this ſhall be intended for Tithes due to the Vicar, and not to the Parſon: Serjeant Aſhley to the contrary, and that the preſcription is good for this extends to the ſoyle and not to the Park; Hobert ſaid, that Tithes of corn are ſometime payd to the Vicar, and not alwayes to the Parſon; for put the caſe that at the time of the derivation of the Vicarage out of the Parſonage the compoſition was that the Vicar ſhall have the Tithes of that Park, in this caſe by reaſon of ſuch general terms, he ſhall have the Tithe of hay, corn, deer, or any other thing which growes in that. And the compoſition being made before time of memory, no man can ſay but that it was made in ſuch manner, and the caſe of Okenden Cowper in this Court, in which the Court was divided, differed from this caſe, for there the preſcription was to pay a Buck ariſing and coming out of the Park, and there was no deer left in the Park: and Hutton agreed, for there he deſtroyed his own preſcription, and he agreed with Bracies caſe put after, for there was a contrariety in the preſcription. Warberton, the caſe of Bracie in this Court was, that the Parſon libelled againſt him for the Tithe of corn, where this was due to the Vicar and not to the Parſon and denyes him for that reaſon, for he may not plead the title of another man; and the Parſon and the Vicar ought to agree among themſelves; but in our caſe no Tithes are to be ſet out, and for that reaſon he may plead this, but it ſeems to me that the preſcription ſhall go to the ſoyle, and not to the Park: when it is deſtroyed, he ſhall pay Tithes in kind as a garden or an orchard, ſo long as it is uſed as a garden or an orchard, that the occupier of that ſhall pay a peny: now if this be ploughed and converted to other uſe, he ſhall pay Tithes in kind: and Hobert agreed to the caſe of the garden or orchard, for the penny is paid for the herbs or fruite. Winch was abſent: and Hutton ſaid, that the preſcription ſhall go to the ſoyle, and the Vicar by preſcription may have the herbs of the glebe of the Parſon: Hobert, the Park is only an appellation or name of land, and this name or appellation may not pay Tithes, but the land it ſelf: and put the caſe that a man had always paid 10. s. for the Tithes of a meadow, and after he ſowed that with corn, here for the payment of this 10. s. he is diſcharged: Warberton, I deny the caſe of the meadow; and ſo it was adjorned.

Bartlet againſt *Bartlet*, Trin *Jac.* Rot. 1784.

TR. 18. Iac. Rot. 1784. Richard Bartlet brought an action upon the caſe againſt Thomas Bartlet, and he declared upon an accompt, and ſhewed that the Defendant was found in arrerages in 20. l. which he promiſed to pay when he ſhould be requeſted, and now the Plantiff had not laid any day or place of requeſt in his declaration, and Aſhley moved in arreſt of Judgment, that the declaration is not good, for the requeſt is alſo parcel of the promiſe: but Hobbert chief Iuſtice ſaid, that when a man brings an action upon the caſe for a thing which was originally a debt, the Plantiff need not lay any time or place of the requeſt, but when the action is brought for a Collateral thing, there he ought to lay a day and place of the requeſt, and ſo it was adjudged according in the ſame caſe.

King againſt *Bowen*, Ent. Trin. *Jac.* Rot. 1755.

J. Ban: 91. pl. 28. S. C.
Hutt: 44. S. C.

KIng againſt Bowen entered Tr. 18. Iac. Rot. 1755. William King brought an action upon the caſe againſt Iohn Bowen for theſe ſlanderous words ſpoken of him,

him, King is a falſe foꝛeſwoꝛn knave and took a falſe oath againſt me at a commiſſion at Witham, and the Defendant Juſtified the woꝛds, and it was found foꝛ the Plantiff, and Henden ſaid, that it had been alleadged in arreſt of Judgement that the woꝛds are not actionable, and he ſaid that he agreed if one ſay of another that he was foꝛeſwoꝛn in a Court which is not a Court of recoꝛd, that none action will lye, becauſe the paꝛty is not puniſhable foꝛ that in peꝛjuꝛy, but in our caſe the commiſſion iſſued out of the high Commiſſion Court, which Court to the examination of witneſſes is in nature of a temporal Court, and had been confiꝛmed by act of Paꝛliament: and Seꝛjeant Haꝛvey aꝛgued to the contꝛaꝛy, that the fiꝛſt woꝛds are not actionable, and then the ſubſequent woꝛds are uncertain, and yet if one ſay of another, that he was foꝛeſwoꝛn at the Common Pleas baꝛꝛe, the woꝛds aꝛe actionable, foꝛ it ſhall be intended that this was upon examination in the execution of Juſtice: Hobeꝛt, if a man is foꝛeſwoꝛn in a Court Baꝛon befoꝛe the Steward, this is peꝛjuꝛy, but in our caſe the woꝛds are altogether uncertain, foꝛ it doth not appeaꝛ what authoꝛity the Commiſſioners had, noꝛ yet in what manneꝛ he was foꝛſwoꝛn; and Juſtice Hutton ſaid, if one man ſay of another he was foꝛeſwoꝛn beꝛoꝛe the Biſhope of *S.* this is not actionable, but if one ſay of another, that he was foꝛſwoꝛn beꝛoꝛe the Biſhop of S. upon examination by him by veꝛtue of a Commiſſion iſſuing out of the Chancery, this is actionable, and Hutton agreed to the caſe of the Court Baꝛon, & the ſame Law by him if that be in a Court Leete, but in the pꝛincipal caſe Judgement was aꝛreſted. Eaſter Term. 19. *Jac.*

Waſe againſt *Pretty* Ent. Hill. 16. *Jac.* Rot. 1716.

2. *Dan.* 205. *pl.* 4.

WAſe againſt Pretty Ent. Hill. 16. Jac. Rot. 1716. in an ejectione firme, the caſe was, that one joynt Coppiholder did releaſe to his companion, and the queſtion was, whether this is good without ſuꝛꝛendeꝛ and admittance, foꝛ it was objected, if this ſhall be good, then a Coppihold ſhall paſs without the aſſent of the Loꝛd, but it was reſolved by Hobeꝛt, Waꝛbeꝛton and Winch (Hutton being abſent) that the releaſe is good, and Waꝛbeꝛton ſaid, that by Littleton, if 3. Joyntenants aꝛe, and one of them releaſe to another, he to whom the releaſe is made is in by the releaſoꝛ, but if theꝛe aꝛe but two, then he is in by the Loꝛd oꝛ fꝛom the fiꝛſt conveyance; Winch, if two Joyntenants aꝛe in capite, and one releaſe, to the otheꝛ, the King ſhall not have a fine foꝛ this Alienation; but Hobeꝛt ſaid, that the pꝛactice is otheꝛwiſe at this day, but he ſaid, that when one joynt Tenant releaſes to another, he is in by the fiꝛſt conveyance, and in the caſe in queſtion the releaſe ſhall be good without ſuꝛꝛendeꝛ and admittance, foꝛ the fiꝛſt admittance is of them and of eveꝛy of them, and the ability to releaſe was fꝛom the fiꝛſt conveyance and admittance; it ſeems if a Tenant in Capite alien upon condition, and afteꝛwaꝛds he entes foꝛ the condition bꝛoken, he ſhall not pay a fine foꝛ ſuch an alienation: Hitcham Seꝛjeant ſaid, that if land be given to two upon condition that they ſhall not alien, and one releaſeth to the otheꝛ, this is no bꝛeach of the condition; Hobeꝛt, if the King gꝛant you his demeaſnes, you ſhall not have his Coppihold.

Winch ſaid, that it was adjudged in this Court, that where one eꝛected a houſe ſo high in Finſbuꝛy fields by the wind mills that the wind was ſtopped fꝛom them, that it was adjudged in this caſe that the houſe ſhall be bꝛoken down.

Goddard againſt *Gilbert*. *Poſt* 10.

1. *Dan*: 110. *pl.* 6. *S. C.*
1. *Jon*: 11. *S. C.*
Poph: 152. *S. C.*
Hob. 231.

GOddaꝛd bꝛought an action upon the caſe againſt Gilbeꝛt foꝛ theſe woꝛds, thou aꝛt a thiefe, and haſt ſtolen 20 loads of my ſuꝛzes, and upon not guilty pleaded it was found foꝛ the Plantiff, and it was moved in aꝛreſt of judgement by Hitcham, that theſe woꝛds aꝛe not actionable, foꝛ though the fiꝛſt woꝛds of themſelves had

Eaſter Term 19. *Jac.*

been actionable, yet when thoſe words are coupled with other words which do extenuate them, it is then otherwayes, for if a man ſay thou art a thiefe and haſt ſtollen my apples or my wood, it ſhall be intended that the apples and the wood were growing, and be ſaid there is no difference to ſay in this caſe you are a thiefe and have ſtollen 20 loads of my furzes, but it was ſaid by Iuſtice Warberton, that the furzes ſhall be intended to be cut, for that is the moſt natural and proper ſignification of the words; and Hobert chiefe Iuſtice ſaid, that it is true that it is the moſt proper ſignification of the words, but yet they are furzes when they are growing as well as when they are cut down; and Hobert chief Iuſtice ſaid, if a man ſay of another, thou art a thief, and haſt ſtollen my corn; in this caſe the words ſhall be taken in the better ſence, and judgement in the principal caſe ought to be arreſted, and it was the opinion of him and of Winch, that there is no difference where a man ſaid thou art a thief and haſt &c. and thou art a thief, for &c. *ut ſupra*; but it was adjourned.

Winch Iuſtice ſaid, I was of counſel in the Kings Bench in a caſe where a man had a window in the backſide of his houſe, and another man erected a wall within a yard and half of that in his own ground, and adjudged in an action upon the caſe that the wall ſhall be broken down; Warberton, certainly this was an antient houſe, but Winch ſaid that made no difference.

It was ruled, that after imparlance in debt upon an obligation the Defendant ſhall be received to plead that he was alwayes ready to pay, notwithſtanding it was ſtrongly urged 13. Eliz. Dyer 306. is to the contrary.

Gilbert Lewings againſt *Nicholas March.*

Gilbert Lewings brought an action of covenant againſt Nicholas March, and declared, that Charles Cornwallis had granted the next avoydance to the Church of D. to Thomas March, and that Nicholas March was his Executor, and that Nicholas March aſſigned this to Gilbert Lewings his executors and aſſignes, to preſent to the ſame Church when that ſhall become void, and covenanted that the ſame perſon, who ſhall be ſo preſented by him, ſhall have and enjoy that without the let or diſturbance of the ſaid Charles Cornwallis or Nicholas March, or any of them, or any by their procurement; and after Gilbert Lewings preſents I.S. and after I. W. preſented an other claiming the firſt and next avoydance, by the procurement of Charles Cornwallis, and ruled that the declaration was not good, for it ought to ſay that Charles Cornwallis granted to I. w. the next avoydance and procured him to diſturbe, and that by his procurement he was diſturbed; Athow, It ſeems to me to be but little difference to ſay, he diſſeiſed me by the procurement of I. S. and he commanded I. S. to diſſeiſe me, and he did that accordingly at his command.

Sir *Edward Sackvil* againſt *Earnsby.*

Vpon a motion made by Sir Randal Crew in the behalf of Sir Edward Sackvil againſt Earnsby, the caſe was, that two brothers were ſeiſed of land, to the eldeſt for life, the remainder to the youngeſt in tail, and they covenanted with Sir Edward Sackvil to levy a fine to him of that land, & before the fine acknowledged the eldeſt brother dyed, and the queſtion was whether the youngeſt ſhall be compelled to levy the fine, and preſidents were commanded to be ſearched concerning that matter.

Note, that it was ſaid, that where a commiſſion iſſued out of the Court of wards to 4 perſons or to any 2 of them, and one of them refuſe to be a Commiſſioner, and the

the other 3 ſit as Commiſſioners, and he who refuſed was ſworn and examined by them as a witneſs, and ruled that this is good, for though he refuſed to be a Commiſſioner, yet he is not excluded to be ſworn as a witneſs. Eaſter Term 19. Jac.

In evidence to the Jury the caſe was, that Tenant in taile bargained and ſold his land to I. S. and his heires, and I. S. ſold to the heire of the Tenant in taile being of full age, and Tenant in taile died, and the heire in taile claimed to hold his eſtate, and the doubt was, whether he was remitted or no? Hobert was of opinion, that after the death of the Tenant in taile that the heire is remitted, for if Tenant in taile bargain and ſell his land, the iſſue in taile may enter, and where his entrie is lawful, there if he happ the poſſeſſion, he ſhall be remitted; Hutton and Warberton Iuſtices contrary. For at the firſt by the bargain and ſale the ſon had fee, and then the eſtate of the ſon may not be changed by the death of the father, he being of full age when he took this eſtate, and this was in an Ejectione firme of land which concerns Sir Henry Compton and the Lord Morley and Mounteagle.

White againſt *Williams.*

1. Dan. 234. p. 3
3. Dan. 63. p. 11.
Cro. Eliz. 806. S. C.

WHite brought an action of accompt againſt Williams as his Bayliff to his damages 100 l. the Defendant pleaded he never was his Bayliff, and it was found againſt him, and the Judgement was given that he ſhould render an accompt, and at the day the Defendant made default; Ideo conſideratum eſt per Curiam quod Querens recuperet verſus predict. Defendent. 42. l. 10 s. and upon that the Defendant brought a writ of error, and aſſigned for error, that the Court gave Judgement of the value without inquiring of the value, and it was holden by Gaudy and Fenner only preſent, that the Judgement ought to be given which the Plantiff had counted of. Baron Altham contratie, for the Court may in diſcretion give a leſſer ſumme Hill. 43. Eliz. B. R. vide 14. E 3. Accompt 109. 20. E. 3. 17.

Sir *George Topping* againſt *King.*

Hutt. 44.

WAſt was aſſigned in the cutting of Elmes and other Trees to ſuch a price, and Judgement was given for the Plantiff by nihil dicit, and a writ of inquiry of dammages iſſued upon that, and the Jury found to the dammages of 8. s. and upon this Davies the Kings Serjeant moved to have a new writ of inquiry, and that the old writ ſhall not be returned, for the dammages are too little; Winch ſaid, all is confeſſed by the nihil dicit. Hobert, The Jury here have found the value, and preſidents were commanded to be ſearched, and Hobert ſaid, that if an information is for ingroſſing of 1000 quarters of corn, and Judgement is given by nihil dicit, and a writ of enquiry iſſues which findes him guilty of 100. yet this is good. And not, that at another day the caſe was moved again, & it was between Sir George Topping and King, and it was ſaid, if a man recover in waſte by nihil dicit, and a writ of inquiry iſſues, the Jury in this caſe may inquire of the dammages but not of the place waſted, for this is confeſſed and ſo are the preſidents according; and Hobert ſaid, if the Defendant is bound by the nihil dicit as to the place waſted, for what cauſe ſhall not he be bound as to the dammages, and by all the Court if the jury finde dammages only to 8. s. the Plantiff ſhall not have Judgement, for it ought to be above 40. s. Hob. this is in the diſcretion of the Court in this caſe, and it was alſo ſaid in this caſe, that upon the grant of all the trees, and after the grantee cut them, and new ones grow upon the ſtumps which in time will be trees, that in this caſe the grantee ſhall have them alſo by Hobert.

Wetherly

Eaſter Term. 19. *Jac.*

Wetherly againſt *Wells* in an action for words.

WEtherly againſt Wells in an action upon the caſe for theſe words, thou haſt ſtollen hay from Mr. Bells racks, and upon not guilty pleaded it was found for the Plantiff, and now it was moved in arreſt of Judgement, becauſe he had not ſhewed what quantity was of that, and perchance it may be of ſo little a value that it is not felony, and the rather becauſe it is hay from the Racks; but Hobert contrary, that Judgement ſhall be given againſt the Defendant for the Plantiff, for it hath been adjudged lately in this Court, that where a man was charged with petty Larceny to ſteal under the value of 12. d. that an action of the caſe will lie, for the diſcredit is not in the value, but the taking of that with a felonious intent, and yet it had been adjudged in this Court, that where one ſaid of another, thou art a thief, and haſt ſtolen my trees, that in this caſe an action will not lie, but this is by reaſon of the ſubſequent words trees, for it is ſaid Arbor dum creſcit, lignum dum creſcere neſcit. And Winch ſaid, that it had been adjudged actionable to ſay, thou art a thief and haſt ſtolen my corn, and yet perchance not exceed 2. or 3. grains, and Warberton ſaid, that it had been adjudged in the Kings Bench, that where one ſaid thou art a thief and ſtolleſt the corn out of my field, that no action will lie.

The Earl of *Northumberland* and the Earl of *Devon.*

NOte, that in the caſe of the Earle of Northumberland and the Earle of Devon. execution iſſued out for dammages recovered, againſt the Bayliff of the Earle of Northumberland by the name of I. S. of D. and there was I. S. the father and I. S. the ſon, and the father being dead the ſon iſſued his writ of Idemptitate nominis, and he prayed to have a ſuperſedeas; and Warberton demanded of Brownlow if he had any ſuch preſident to award a ſuperſedeas in ſuch caſe, who anſwered, no, and Warberton and Hutton being only preſent ſaid, that they will adviſe of that.

Sir *George Sparke* Preſcription.

IN a Replevin for the taking of a horſe in 5. acres of land in ſuch a place, and the Defendant avowed as Bayliff to Sir George Spark, and ſhewed that Sir George Spark, and all thoſe whoſe eſtate he had in the land, had uſed time beyond the memory of man to have herbage and paſturage in all the 5. acres when that was not ſowen, and upon this plea the Plantiff demurred; Aſhley argued for the Plantiff, that the preſcription is void, and this is not like to the caſe of a common, for a man may preſcribe to have common in another mans land, for this is but a reception of the profits with the mouthes of his cattle, but in our caſe it is all one as to preſcribe to have the land it ſelf, and I may not preſcribe to have land it ſelf, for I may not ſay that I and my anceſtors had uſed to have ſuch land, for ſuch a preſcription is void: to which Hobert chief Iuſtice and all the Court agreed as to that point, and then to prove that this is all one as to preſcribe to have the land it ſelf, he ſaid that if a man lets the profits, and the herbage of land for years, this is a leaſe of the land it ſelf, as was lately adjudged in this Court; which was alſo granted by the Court, alſo he ſaid that this appears by the 27. of H. 8. 12. that a man ſhall have a præcipe quod reddat of paſturage or herbage, but not of common, and a formedon lyes of paſturage 4. E. 4. 2. & the Regiſt. fo. 177. Ejectione firme lyes of paſturage; and ſo he concluded that upon the matter he preſcribed to have the land it ſelf; but Hobert chief Iuſtice and all the Court to the contrary, that

the

the preſcription is good, for that may have a good beginning by grant, for a man may lawfully grant the paſturage and the feeding of his land when that is not ſowed, and by conſequence, if that may be good by grant, it may be good by preſcription; and judgement was commanded to be entered for the Defendant. See preſcription 51. and 52. Easter Term 19. Jac.

In treſpaſs the Defendant pleaded in barre, that ſuch a one was ſeiſed of land in the right of his wife, and that his wife died ſeiſed, and that he was heire to her, entered and gave Colour to the Plaintiff, the Plaintiff replied that the husband and wife were jointly ſeiſed, and that the wife died, after whoſe death the husband was ſeiſed by Survivor-ſhipp, abſque hoc that the wife died ſeiſed; and Warberton and Hutton being only preſent, the traverſe is not good, that the wife did not die ſeiſed, but it ought to be that ſhe did not die ſole ſeiſed.

In treſpaſs for the taking of goods in a place in yorkſhire, and the Defendant juſtified as ſervant to the Biſhop of Durham, and he ſhewed that the Biſhop of Durham has a Faire, and that time beyond memory he and his predeceſſors had uſed to ſeiſe the cattle that were ſold, if he who bought them refuſed to pay toll, and if the thing taken was not redeemed within ſuch a time, he might ſell the ſame. And he juſtified in a place in Durham, abſque hoc that he was guilty in Yorkſhire; and by Warberton and Hutton this is a good traverſe, to the place, for it is local.

If a Capias iſſued, here to have the body of ſuch a one at Weſtminſter ſuch a day, and the Sheriff bring the body, or return the writ before the day, this is good by Iuſtice Warberton.

Tutter againſt *Fryer*.

2. Dan. 637. p. 3.

TUtter againſt Fryer; a rent charge was granted for years with a nomine pœnæ, & a clauſe of diſtreſs if that was not paid at the day, and the rent was behinde, & the years incurred, and it was moved by Athowe, that though the years are incurred, that he may diſtrain for the nomine pœnæ, but the Court was of a contrary opinion, for that depends upon the rent, and the diſtreſs is gone as to both of them.

Duncombe &c. againſt the Biſhop of *Wincheſter*, &c.

Poſt, 11.

DUncombe and others againſt the Biſhop of Wincheſter, and others Defendants, in a Qu Imp. and the caſe was, that Sir Richard Weſton was ſeiſed of the laid Church in fee, in groſſe, and was convicted of recuſancy, and a Commiſſion iſſued to certain Commiſſioners, to ſeiſe two parts of his lands and goods, and they ſeiſed this advowſon inter alia, into the hands of the King, and the King granted the advowſon to the Plaintiff, and the Church became void, and whether the King, or the univerſity of Oxford ſhall have that, was now the queſtion, and it was appointed to be argued the next Term.

Potter againſt *Turner*.

1. Dan: 48. p. 12. S. C. Palm: 185. S. C.

IN the Kings Bench, Paſch. 19 Iac. the caſe between Potter and Turner, was as I conceived to this effect; A. was indebted to B. in 20. l. and C. was indebted to A. in 30. l. and A. in ſatisfaction of the debt, which he owed to B. aſſigned the debt of 30. l. which C. owed to him, and made a letter of attorney to ſue in his name; A. and B. acquainted C. with this agreement, and C. promiſed to B. in conſideration that he will forbear till ſuch a day that he will pay him the money; and upon this promiſe he brought the action againſt C. and he pleaded

Eaſter Term. 19. *Jac.*

ded non aſſumpſit, and it was found for the Plaintiff. And it moved in arreſt of Judgement, that the conſideration was not ſufficient, according to Banes caſe Coke. 9. If executors who had not aſſets promiſe to pay a debt of the Teſtator, this ſhall not binde them, becauſe they who made the promiſe were not chargeable, but on the other ſide, it was ſaid by Whitwick of our houſe, that this was a good conſideration, for the aſſignement of that debt was lawful, and no maintenance at all, as appears by 15. H. 7. 6. and a recovery by B. againſt C. is a good plea in barre, in an action brought by A. againſt C. but Dodderidge Houghton and Chamberlin only preſent to the contrary, for B. here had only an authority to ſue, and this is at all times Countermandable by A. As if I deliver goods to my ſervant to deliver over to I. S. and I. S. promiſe my ſervant that in conſideration that he will deliver them to him, he will give him ſo much money, this is no conſideration, except that they are delivered accordingly, for this is only an authority to deliver goods which is alwayes countermandable by me. And Judgement was entered for the Defendant. vide 4. E. 4. 14.

Ewer and *Vaughan.*

IT was ſaid by Dodderidge and A. in the argument of the caſe, between Ewer and Vaughan, that it had been adjudged by all the Juſtices, in one Trewmans caſe, that no writ of error lyes of a judgement, given in the Stannerys in Cornwal.

A Prohibition to the Admiralty.

MAny poor Partiners ſued one Iones the Maſter of a ſhip, for wages in the Admiral Court, and judgement was given againſt Iones, and now he prayed to have a prohibition, and he ſuggeſted that the contract was made, at London in England, and ſo the ſuit was not maintainable, in the Admiral Court, but the prohibition was denyed, becauſe he had not ſued his prohibition, in due time, viz. before a judgement given in the Admiral Court, which in point of diſcretion they diſallowed; and alſo theſe are poor Partiners, and may not be delayed of their wages ſo long, and beſides they may all joyn, in a Libel in the Admiral Court, but if they ſue here, they muſt bring their actions ſeveral, for they may not joyn here in an action, and therefore it is good diſcretion in the Court, to deny the prohibition.

2. *Dan.* 271. *pl.* 21.

Paſtons caſe, it was ſaid by Hobert, that a Coppiholder may hedge, and incloſe, but not where it was never incloſed before, and agreed by him, and Warberton, that a Coppiholder may dig, for Marle without any danger of forfeiture, but he ought to lay the ſaid Marle upon the ſame Coppihold land, and not upon other land, and this was upon the motion of Hendon *Serjeant.*

In a caſe which concerned, the Lady Mollineux and Fulgam, the caſe was in an Ejectione firme, that the Jury found the defendant guilty, of 10. acres, and the judgement was entered of 20. acres, and upon that the defendant brought a writ of error, in B. R. and now the Plaintiff prayed that this might be amended: and Finch argued, that this ought to be amended, and he cited a caſe. Paſch. 8. Iac. Rot. 525. Iohn Chilley was Plaintiff in debt, and recovered, and the judgement was, that the aforeſaid, Henry Chilley ſhould recover &c. and upon that error, was brought in the exchequer chamber, and that was aſſigned for error, and yet after Paſch. the 9th. Iac. this judgement was amended in the Kings Bench, and Iohn inſerted for Henry, and diminution was alleadged, and the firſt judgement was affirmed in the exchequer chamber, and he cited a caſe, M. 8. Iac. Rot. 1823. in C. B. Bower, was brought of 4. Gardens, and judgement was given,

to

to recover in 3. and upon this error was brought, and yet this judgement was afterwards amended, and he cited a case, Pasch. 17. Iac. between Sherley and Underhil in a Qu. Impedit, where it was amended after error brought, and he vouched one Masons case 12. Iac. in an action upon the case, against the husband, and the wife for words which were spoke by the wife, and judgement was given against them, and that the wife capiatur, where it should be husband and wife Capiantur, and yet this was afterwards amended: Hendon contrary, after error is assigned, it may not be amended, in point of substance, and the case of Chilley may be good Law, for the misnaming only et prædictus Henricus, where was no Henricus before, could not have other signification, or intendment then John who was named before in the record; Warberton and Hutton, the misnameing Henry for John, is matter of substance cleerly, and then Hendon said, that now the judgement shall not be amended, because the prayer of the Plaintiff, to have that amended came too late, because it is after error brought, and diminution alleadged; and the record certified, and then both the parties are concluded, but if only, a writ of error was brought, and no diminution was alleadged, that then the judgement may be amended, and he said, that he had not found in any book, where any amendment was after diminution alleadged, as here, and he cited 22. E. 3. 46. in dower, it was assigned for error, that no warrant of Attorney was entered for the Defendant, and ruled that this may not be assigned for error, after a scire facias sued; see 4. E. 4. 32. but Hobert chief Iustice said, that it shall be a brave case, that our judgements shall be made good, or bad, at the pleasure of Clarks, and we shall not be able to amend them, to which Warberton also agreed. And day was given over to speak to that again, and after, in the same Term this judgement was amended, per Curiam. Easter Term. 19. Iac. Moor, 894. Hob. 327. Hutt. 41.

Action of debt upon a bond, and the Condition was to save the obligee harmless, of a nomine pœnæ, against Mary Moore, and he pleaded that he had saved him harmless, and per Curiam this is not good, for if he will plead in the affirmative as here, he ought to shew how he had saved harmeless, but if he had pleaded in the Negative, as he might well, then non damnificatus is a good plea generally. 2. Dan. 248. pl. 5.

Harrington against *Harrington* in accompt.

HArrington brought an action of accompt against Harrington, and declared of the receipt of moneys, by the hands of a stranger, and the Defendant pleaded in barre a gift of the same money, afterwards by the Plaintiff to him; and it was argued by Towse, that this was no plea in barre of an accompt, but it is a good discharge before Auditors, and he cited 28. H. 6. 7. Hendon to the contrary, and said the opinion of Brian chief Iustice 21. E. 4. is that he may plead that in barre of accompt; and Warberton Iustice being only present agreed, for by the gift it is his own monyes, and therefore he may plead that in barre. 1. Dan. 226. pl. 12. 13.

It was said by Warberton, that if an Advowson is holden of the King, and the Tenant alien without licence, that the King may not seise that without office, which was granted by Hobert, and by Winch only present, and in the same case by Warberton, that a scire facias, issuing against the Alienee will not intitle the King, but ought to be an office found, and it was also said in the same case, by Serjeant Iones, that the ordinary shall have 28. dayes to examine the ability of one who is presented by the canon Law; and the same Canon Law is, that the Patron shall not present another during the 28. dayes.

Easter Term 19. Jac.

1. Dan: 110. p. 6. ſ. c.
1. Jon: 11. ſ. c.
Poph: 152. ſ. c.
Hob. 331.

Goddard againſt *Gilbert.* Ante 3.

GOddard brought an action upon the caſe, againſt Gilbert thou art a thief, and haſt ſtolen 20. load of my furzes, and upon non culpabilis pleaded, it was found for the Plantiff; and now it was moved in arreſt of judgement, by Hitcham, for where words may be taken in a double ſenſe, one actionable, and another not actionable, they ſhall all times be taken in the better ſenſe, and in our caſe, to take furzes may be fellony, and it may be not fellony, for if they are growing they are not fellony, and it ſhall be intended that they were growing, rather then cut down, and no man will preſume, that any will take 20. loads of furzes, with a fellonius intent, becauſe the carriadge of them is viſible to all the world, for it ſhall not be intended, that he carried thoſe in the night, and ſo he prayed that the Plantiff may be barred.

Attoe Serjeant contrary; words which implies a double ſignification, ſhall be taken in the worſer ſenſe, which tends moſt to the diſgrace of the party, for they ſhall be ſuppoſed, to be ſpoken in malice, and ſo with a purpoſe to defame the party, and he cited a caſe, Trin. 2. Iac. B. R. Rot. 663. *Kellam* againſt Moneſt, thou art a thief and haſt ſtolen my corn, and adjudge to be actionable. Hobert, Warberton, and Winch contrary, for words ſhall be taken in the better ſenſe, and not in a ſtrained ſenſe to puniſh the party which ſpake them, as if one ſay to another, I wonder you will eat, or drink with him, for he hath the pox, now every one that heareth, that will ſuppoſe, that he means the french pox, and yet in a legal ſignification it ſhall not be taken, but in the better ſenſe, for the ſmall pox: but Warberton ſaid, that if one ſay of another, that he is laid of the pox, an action lyes, for it is intended the french pox; and Winch ſaid, that thoſe actions of ſlander, were known to law but of late times, and for that 26. H. 8. it was thought that an action would not lye, for calling another thief, and in the principal caſe, judgement was commanded to be entered, quod Querens capiat nihil per brevem ſuum, and note, that I ſaw Hobert ſhew preſidents to Winch, in a paper which were delivered to him by the Plantiff, and drawn by his Councel, and he ſaid to Winch, that by thoſe it ſeemed, that in the Kings Bench they made a difference between, (for) and (and) as had been ſaid before; and he marvailed much at that.

Cro. Jac. 39.

In a Capias Ulagatum before judgement, the Sherif returned that I. S. and I. N. reſcouſed the party &c. and Attoe moved, that the return was not good, for there ought to be additions, by which they may be ſued to the outlawry, but Hobert and the Court held this to be good without addition, for no ſtatute, nor book will compel the Sheriff to give additions in this caſe. And it was ſaid, that if the Sheriff in this caſe, return that the party himſelf, ſimul cum I. S. and I. N. made the reſcouſe, that this is not good, but in the principal caſe, it was ruled that the return was good, and the reſcouſers which were preſent, were committed to the fleet, Homan and Hull were reſcouſers.

Upon the reading of the record the caſe was, that an executor brought an action againſt one upon a promiſe made to the Teſtator: in which the executor was nonſuite; and 3. l. coſts given againſt him: and the Defendant brought an action of debt upon that recovery, againſt the executors: and upon this it was demurred in law, and Serjeant Towſe ſaid, that there are two cauſes of the demurrer, firſt, whether the Defendant ſhall be charged as executor, and is not named executor, and ſecondly, whether upon the nonſuite of an executor, the

Defendant

Defendant ſhall have coſts by the ſtatute, of the 23. H. 8. Hobert chief Iuſtice, ſaid to him you ſay well. Eaſter Term 19. *Jac.*

Note that it was ſaid, by Hobert chief Iuſtice, that if a man dies inteſtate, and he to whom the Adminiſtration appertaines, is ſued by others which pretend to be Adminiſtrators, and ſentence is given againſt the right Adminiſtrator, and coſts given againſt him, the coſts ſhall not be of the proper goods of the Adminiſtrator, but of the goods of the inteſtate; as the coſts which are ſpent in the ſpiritual Court, for the probate of a Teſtament, ſhall be only of the goods of the Teſtator; Hutton if the Legatee ſue in the ſpiritual Court, for a Legacy, and recovers the coſts, which he ſhall recover, ſhall not be of his own goods, but of the goods of the Teſtator, and no prohibition ſhall be granted, for any ſuch ſentence given in the ſpiritual Court: Hobert to the contrary; for if by ſuch means the goods of the Teſtator are ſo waſted, that the debts, and legacies of the Teſtator, may not be diſcharged, a prohibition ſhall be granted, and in every caſe, where the ſentence in the ſpiritual Court, croſſeth the common law, a prohibition lyes, and he ſaid that in the caſe of one Barrow in this Court, it was his opinion, and the opinion of the reſt of the judges, that if Adminiſtration be committed by force of 21. H. 8. and the Adminiſtrator pay all the debts and Legacies, that in this caſe, the ordinary had not power to diſpoſe of the reſt of the goods, to the children of the inteſtate, but they ſhall remain to the Adminiſtrator, and that by the very intention of the Statute of 21. H. 8. but Hendon ſaid, that he could ſhew a preſident of that, and the Court deſired that they might ſee, that if any ſuch preſident were.

LLewellings caſe.

2. *Dan.* 250. *pl.* 16.

Vpon the reading of a Record, in the caſe of LLewelling, the condition of the obligation was, that the obligor ſhould ſurrender his Copihold land, to the uſe of the obligee, and he pleaded that he had ſurrendered that, and upon that plea, the Plaintiff demurred, and it was adjudged upon the opening of the caſe, by Warberton and Hutton, being only preſent in the Court, that judgement ſhall be given for the Plaintiff, for the plea in barre is not good, becauſe the Defendant had not ſhewed when the Court of the Lord was holden.

Duncombe againſt the *Univerſity* of *Oxford.* *Ante*, 7.

In a Qu. Impedit, in which Duncombe and others were Plaintiffs, who were grantees of the King, againſt the Univerſity of Oxford: and the caſe was, that Sir Richard weſton was ſeiſed of an advowſon in groſſe, inter alia and was convict of recuſancy, and a Commiſſion iſſued, to ſeiſe two parts of his land, and goods, and they ſeiſed this advowſon, inter alia, and the King granted the advowſon to the Plaintiffs, and the Church became void, and they preſented, and were diſturbed by the Univerſity of Oxford, and their Clark, upon which they brought a Qu. Impedit, upon which a demurrer was joyned: and Serjeant Iones argued for the Plaintiff, and there was two points in the caſe, firſt, whether an advowſon in groſſe, is given to the King by the Statute of the 28. of Eliz. and the Statute is, that the King ſhall ſeiſe the lands, tenements, & hereditaments, of ſuch a recuſant convict, and whether by the ſame ſtatute an advowſon in groſſe, ſhall be ſeiſed, and he held that it ſhall, for though perchance the word lands, and Tenements, will not carry that, being an advowſon in groſſe, yet this word hereditament, will carry it to the King by force of the Satute, for it appears by dyer 350. that if the King grant an advowſon, by the name of an hereditament, that in this caſe this will paſs the advowſon, and for that Coke 10. Whiſtlers caſe, the King by Hill. 18. *Jac.*

Eaſter Term. 19. *Jac.*

the grant an of hereditament, grants an advowſon, by ſuch words to a common perſon then by the ſame reaſon a common perſon may grant, that to the King by the ſame words: but it may be objected, that becauſe an advowſon in groſſe; is not valuable, therefore it is not given to the King; and upon this doubt upon the Statute of Wills, 32. H. 8. the queſtion was, whether an advowſon was deviſable; by the name de bonis et Cattallis fellon. Butler, and Bakers caſe, that they are not deviſable, for it is not valuable, but the 4th Iac. between Taverner and Gooch, which caſe may be ſeen in the new book of entries, that an advowſon was deviſable: before the Statute 5. H. 7. 37. it ſhall be aſſets, 9. H. 6. 55. recovery in value lyes of that; but admit that this is only a thing of pleaſure, for the advancement of a friend, yet that ſhall be given by the Statute to the King.

J. And. 348. Poph. 87. 3. Co. 25. Moor, 254.

But the ſecond objection is, that though it is given to the King, yet it is not extendable upon the Statute by the Commiſſioners, for anſwer to that, ſee Sir Chriſtopher Hattons caſe, upon the Statute of H. 8. which ſaith, if a man be indebted to the King, all his lands, and Tenements, ſhall be extended for this, and it was ruled, that an advowſon was extendible for the debts of the King, and more is given to the King by the Statute, of the third of Iaco. then was by the 28. Eliz. for by the 28. of Eliz. the King may not ſeiſe the land, but upon default of payment, of 20. l. by the month, but by the Statute of the third Iaco. he may ſeiſe preſently, and no election is given to the party: ſecondly, by the Statute 28. Eliz. the ſeiſure of the King, was only in the nature of diſtreſs, for the payment of money, but by the Statute of 3. Iac. the King had election to ſeiſe; to ſatisfie himſelf, and he may refuſe to be ſatisfied at his pleaſure, and ſo the Statute which gives this to the Univerſity, doth not take away the title of the King, and upon that he concluded, and prayed judgement for the Plantiffs: Harris Serjeant to the contrary; the Statute of 3. Iaco. is the only ſubject of the doubt, and the firſt branch diſables the recuſant to preſent, ſecondly, it makes the preſent action void, thirdly, after conviction the Univerſity ſhall preſent, and this in verity, is that upon which the doubt is founded, and upon that branch he conceived that the King had concluded himſelf, to preſent to the church of the recuſant, for he being party himſelf to that act of Parliament, he had diſmiſſed himſelf of all right, and Forteſcue in laudibus legum Angliæ non ſunt ad voluntatem principis, ſed ad voluntatem totius Regni, id eſt, the Statutes of England, are not at the will and pleaſure of the King, but at the will of the whole Kingdome, Doctor and Stud. agreed, and 14. H. 8. Fo. 7. E. 6. Monnſon; and the caſe of Alton woods, if the ſaving of an act of Parliament be repugnant, it is void, and ſo upon thoſe caſes, he inferred that the King being party to every act of Parliament, he is bound by that, and had diſpoſſeſſed himſelf of the advowſon, by the Statute of the 3. of Iaco. which had given that to the Univerſity, and had abrogated the power of the King, to ſeiſe the advowſon, by vertue of the act of 28. of Eliz. for otherwiſe, this Statute which gives that to the Univerſity, ſhall bee meerly void, and Statutes which are repugnant to former lawes take them away, and do not confirme them, and though the Statute of the 3. of Iaco. is in the affirmative, yet that hath taken away the force of the Statute, of the 28. Eliz. but it may be objected, that before the recuſant is convict, the King had but a poſſibility, and then by the Statute of the 3. Iac. the King had not diſmiſſed himſelf, of that which in judgement of the law is but a meer poſſibility, and by conſequence, becauſe he had nothing at the time of the making of the Statute, but a poſſibility, he had not given that over, by the ſame Statute to the Univerſity; to this he anſwered, that the King may well give a poſſibility, and a future thing, as 9. H. 6. 62. 24. E. 3. 24. 30. E. Eliz. Treſhams caſe, and ſo he concluded, becauſe that this is given to the Univerſity by act of parliament, the King being party, he had diſmiſſed himſelf; and the 3. Iaco. ——— repeals 28. Eliz. as to that purpoſe, and ſo he prayed judgement upon the whole matter for the Defendants.

13. Eliz. cap. 4.

And

And it was ſaid by Hobert chief Iuſtice that this is indeed a caſe, of great weight and importance, and the Court agreed that the Statute, of the 3. Iacobi gave only a power to the Univerſity of Oxford, and not an intereſt, but day was given over to argue this again the next Term. Eaſter Term. 19. Jac.

Sir *George Savil* againſt *Thornton*.

3.B.75.p.18.

SIr George Savil declared, that he was ſeiſed in fee, and in groſs, of ſuch a Church, and that he preſented I. S. his Clark who died, and that he preſented another, and was diſturbed by Thornton the incumbent, the Defendant pleaded, that a long time before the Plantiff had any thing in that, the Pryor of D. was ſeiſed of the advowſon, and he being ſeiſed ſuch a day granted the next avoydance, to one Golding, and that the advowſon and the Priory, came to the hands of H. 8. by the Statute of 31. H. 8. by force of which H. 8. was ſeiſed, and afterwards the church became void, and the executor of Golding who was grantee of the next avoidance, preſented his Clark who was admitted accordingly; and afterwards he died, that H. 8. died ſeiſed of the advowſon, which diſcended to E. 6. and ſo to Queen Mary, and from her to Queen Eliz. who was ſeiſed in the right of the Crown, and ſhe being ſo ſeiſed granted the next avoidance, to one Buckley her Clark, who was admitted, inſtituted, and inducted; after which Queen Eliz. died, and the advowſon diſcended to King Iames; and in the 7th. year of his raign the Church became void, and he preſented the Defendant, the Plantiff by way of proteſtation, ſaid that Queen Mary was never ſeiſed, nor died ſeiſed, and by proteſtation that Queen Eliz. was never ſeiſed, ſo that this might diſcend to King Iames, and for plea ſaid that well and true it is, that H. 8. was ſeiſed, and died ſeiſed, ſo that this diſcended to E. 6. and that E. 6. ſuch a year of his raigne, granted that to Wyat and his wife in fee, who granted that to the Plantiff, and that Queen Eliz. preſented E. only, abſque hoc that E. 6. died ſeiſed, upon that it was demurred in law; and he ſhewed the cauſe of his demurrer, that becauſe the proteſtations which he had taken in his replication are not good, therefore the traverſe is not good.

Trin. 19. Iac. 1. Jon. 11. Palm. 306. 2. Ro. Rep. 239. Exo. Iac. 650.

And it was argued for the Defendant, by Bawtry Serjeant that the replication is not good, becauſe he had taken that by proteſtation which is traverſable, ſee the principal caſe of Gresbrook and Fox, and the 22. H. 6. and then for the traverſe he held that to be naught; firſt becauſe he had traverſed that which was but a mean conveyance. Secondly he had traverſed that which he had confeſſed, and avoided; and thirdly he had not traverſed that which he ought not to have traverſed, and for the firſt it is put regularly in our books that a mean conveyance ſhall not be traverſed, and the deſcent here from E. 6. is but a mean conveyance, and the ſubſtance is the preſentation of Queen Eliz. and that ought to be traverſed, 17. H. 7. 2. the Prior of Tower Hills caſe, there it ſaid, if in Aſſiſe the Tenant plead, that the Plantiff was ſeiſed, who infeoffed one B. who infeoffed C. who infeoffed the Tenant, that it is no plea for the Plantiff to ſay, that he was ſeiſed till the Defendant diſſeiſed him, abſque hoc that C. enfeoffed him, and for that reaſon, he ought to traverſe the feofment, made by B. for the other was but a mean conveyance: ſee Dyer 107. in Treſpaſs the Defendant conveyed to the donee, by 5. or 6. diſcents by dying ſeiſed, of the eſtate taile in every of them, the Plantiff confeſſed the intaile, and conveyed to him by feofment made by the heir of the donee which was a diſcontinuance, and took traverſe to the dying ſeiſed of the ſame feoffor, and ruled to bee evil, for he ought to traverſe the moſt antient diſcent: 42. H. 3. 7. Secondly it is evil, becauſe he had confeſſed the ſeiſin of E. 6. and the grant by the ſame King to Wyat, and ſo had confeſſed and avoyded

15. H. 7. 2. p. 6. 2. Bro. Ab. 291. p. 272.

Eaſter Term 19. Jac.

avoyded the ſeiſin of the ſame King, and then the Law will not ſuppoſe that E. 6. purchaſed that again, and for that the traverſe of his dying ſeiſed is evil, when he had ſufficiently confeſſed and avoided that before, as Dyer 336. in Vernons caſe, a diſcent was pleaded to the heire from his anceſtor, the other party ſaid, that the anceſtor devиſed that to him, abſque hoc that this diſcended to him as ſon and heire, and ruled to be evil, for a traverſe needs not when he had confeſſed, and avoyded that before: Vide 14. H. 8. Sir William Meerings caſe, 26. H. 8. 4. by Fithzherbert, but Brook in the abridgement of the ſame caſe, ſaid that if the traverſe is evil then he had waved the plea before, and all was evil: 7. E. 4. by Littleton, for hereby the repreſentation of Queen Eliz. ſhe had gained the inheritance to the Crown, and then the traverſe being evil, he had waved the former plea which was good without traverſe, and this ſeiſin in the Crown is not anſwered, but by way of argument as here 14. H 6. 17. he ought to traverſe abſque hoc that he died in his homage. 20. E. 4. 5. 35. H. 6. 32.

Serjeant Iones to the contrary, and as to that which hath been ſaid, that the preſentment is alleaged to be in jure coronæ, and the confeſſing the preſentment is a plea by way of argument, to which he anſwered that the record is not ſo, but the ſeiſin of the advowſon is alleadged by diſcent, to Elizabeth Queen, by force of which ſhe was ſeiſed in jure coronæ, and Iones argued that the traverſe is good, for every plea in barre ought either to be traverſed, and denied, or confeſſed and avoided, and here that ought to be traverſed Dyer 208. 312. in abowry for a rent charge, and ſeiſin was alleadged in the grantor of the land in fee, and the Plantiff ſaid he was ſeiſed in taile, he ought to traverſe that he was ſeiſed in fee, and a good traverſe Hill. 2. Iac. in C. B. Rot. 1921. Edwards againſt D. it was pleaded that ſuch a man was ſeiſed in fee of a rent charge, and the other confeſſed that he was ſeiſed in fee, and that a long time before he enfeoffed one I. S. there he ought to traverſe, that he was ſeiſed at the time of the grant: ſee the new book of Entryes Tavener and Gooches caſe, in a Qu. Impedit. And a note by the Lord Cooke: alſo he ſaid, that after the grant there may be an uſurpation, and ſo the dying ſeiſed in the caſe of an advowſon in groſs ought to be traverſed, 21. E. 4. 1. 20. E. 4. 14. and as to that which hath been ſaid, againſt the proteſtations; he anſwered it ought to be traverſed, and for that the reſt ought to be taken by proteſtation: and in ſome caſes the conveyance is traverſable; ſee Cromwels and Andrews caſe. And ſo he concluded and prayed judgement for the Plantiff

Note that he ſaid, that it was adjudged in that Court 2. Iac. in the caſe of the Biſhop of Wincheſter, that two uſurpations gaine the advowſon from the King. And the reaſon was, becauſe the King by an uſurpation may gaine an advowſon, in him out of a Common perſon, and if the King Uſurpe, and the right patron preſent, he is remitted: Hobert by ſuch uſurpation, the poſſeſſion is gained from the King, but not the right, and note that upon the argument in the principal caſe, by Bawtry and Iones, it was ruled by Hobert, Warberton, and Hutton, that if the Defendant do not ſhew better cauſe by ſuch a day, judgement ſhall be given againſt him; and Hutton ſaid, that he had ſtudied the caſe, and found no doubt but that the traverſe is good, Winch was abſent in the Chancery.

M. 19. Iac. C. P.

IT was moved for a prohibition by Harris Serjeant, to the Court of Audience, becauſe that the Plantiff was ſued there for ſaying to one thou art a Common Queen, and a baſe Queen, and Harris ſaid, that a prohibition had been granted in this Court, for ſaying to one that ſhe was a piperly Queen, and it was the caſe

caſe of Man againſt Huckſler; and Finch ſaid, though the words are not action- Trin. 19.
able in our Law, they are puniſhable in the ſpiritual Court, for the word Quean *Jac.*
in their Law, implies as much as whore, but Hobert ſaid, that this word Quean is not a word of any certain ſenſe, and is to all intents, and purpoſes, an individuum Vagum, and ſo incertain; ſee more after.

Note that it was ſaid by Juſtice Warberton, that it was adjudged in the caſe of one Ablaine of Lincolns Inne, that if a man made a leaſe for years rendering rent, and the leſſee or a ſtranger promiſe upon good conſideration to pay the rent; that in this caſe no action upon the caſe will lye, for it is a rent, and is a real thing; and Hutton Juſtice being only preſent agreed, this was upon the motion of Finch Serjeant, 8 Mic. 43. Eliz. in the Kings Bench in an action upon the caſe, & he declared how he let certain land to the Defendant for years, in conſideration of which the Defendant promiſed to pay him for the farm aforeſaid, 20. l. and Hitcham moved that the action will not lye, becauſe it appears to be for a rent, for which an action of debt lyes, but by Gaudy, Fenner and Clench it is not a rent, but a ſumme in groſs, and for that reaſon, becauſe he promiſed to pay that in the conſideration of a leaſe, clearly an action upon the caſe lyes, but Sir John Walter replyed, that a writ of error was brought of this caſe of Simcocks in the exchequer chamber, and the matter in law was aſſigned for error, and it was ruled that no action upon the caſe will lye, for Walmſley ſaid this was a rent, for of neceſſity there ought to be ſuppoſed a commutation between the leſſor and leſſee, and that the leſſor demanded of the leſſee, how much he would give for that, and then he anſwered 20. l. this made an entire contract, and for that reaſon an action of debt lyes, and not an action upon the caſe, and Savil and Kingſmil agreed to this.

In evidence to the Jury, in a replevin brought by I. S. againſt one Bennet, for the taking of beaſts, and the Defendant made Conuſance, and he ſaid that Mr. Potts was ſeiſed of 6. acres of land, and granted a rent charge out of that to one William Pots his ſon in taile, and for rent behinde he avowed, and the iſſue was, that the rent did not paſs by the grant; and Hobert ſaid, that in this caſe the avowant ought to prove that the grantor was ſeiſed of 6. acres, or more, and not of 4. or 5. acres, if he will maintain his iſſue in this caſe.

Action upon the caſe for words he innuendo the Plantiff ſtole the Tobacco out of his Mrs. ſhop. Finch moved the declaration was not good, becauſe he had not averred that there was a communication concerning him before, and where the perſon is incertaine there the innuendo is void, Hobert and Winch held that to be good, but then Hobert moved that the declaration was not good, becauſe he ſaid the Tobacco in his Mrs. ſhop, and had not averred that there was Tobacco there, to which alſo Winch agreed, but if he had ſaid that he had ſtolen Tobacco out of his Mrs. ſhop; ſuch declaration without any averment is good; but here the words (the) had altered the ſenſe, and ſo there ought to be an averment; and Winch ſaid, that if he had ſaid, that he had ſtole 2 or 3 pound of Tobacco out of his Mrs. houſe, this had been good without any averment, for the certainty appears; and it was adjourned.

Sir *George Stripping* in Waſt.

SIir George Stripping brought an action of waſte, and an eſtrepment was awarded to the Sheriff of Kent, to prohibit him to make waſte, and the Sheriff returned the writ executed accordingly: and now there was an affidavit made to the Court, that ſince the eſtrepment he had cut down certaine Willowes, which grew

Tr. 19. Jac.

grew upon the bank of the River, by which a bank fell down, and a meadow adjoyning was overflowed, and upon this affidavit Davies moved for an attachment againſt the Defendant, for it appears by this affidavit that waſte is committed, for the cutting of willowes in this caſe is waſte, becauſe that they ſupport the bank, as if they grew neer a houſe: Hobert and Winch being only preſent, that this is a waſte in law, but yet no attachment ſhall be awarded, becauſe that this appears only by affidavit, and is only the collection of the party, and this doth not appear by pleading, or by the return of the Sheriff; and Brownlow ſaid, that in this caſe he ought to have a Bond, which was granted.

Maior againſt two *Bayliffs*.

2. Jan. 225. pl. 10.

ACtion of falſe impriſonment was brought by Major, againſt 2 Bayliffs of a corporation, who pleaded not guilty, and at the niſi prius the Plantiffe was nonſuite; and now Serjeant Richardſon moved upon the Statute of cap. 5. 7. Iac. for double coſts, and that upon the very words of the Statute, and the queſtion was whether the coſts ought to be taxed by this Court, or by the Iuſtices of Aſſize: Hobert ſaid, that upon the nonſuite the Iuſtices of Aſſize might have commanded the Jury to have taxed the ſingle coſts, and then the ſame judge might have doubled them, and that within the words of the Stat. but if the judge grants this, then upon his certificate the double coſts ſhall be aſſeſſed, for otherwiſe the party ſhall be without any remedy, and Brownlow ch. Prothonotary agreed with that as to the certificate, that this Court ſhall aſſeſſe the Coſts, and Brownlow had a preſident accordingly.

Grice againſt *Lee*.

Cro. El. 347. S. C.

2. Roll. Rep. 346. S. C.

4. H. 127. S. C.

Palm. 319. 368. S. C.

6. Jon. 12. S. C.

Godb. 347. S. C.

GRice againſt Lee in an action upon the caſe, and the Plantiff declared that he being long time before, and ſtill is ſeiſed in fee of certain meſſages, and lands in Layton Buzard in the County of Bedford, and that to theſe meſſuages he had a common appendant time beyond memory &c. in 600 acres of waſte called Layton Heath, and had common in 600 acres of wood in Layton aforeſaid, and that the Defendant had made certaine conney borroughs, and which the aforeſaid conneys (where he had not made any mention of any conneys before) eat up the graſs, and that the Defendant had incloſed the ſaid wood, by which the Plantiff had loſt the profits, and the Defendant as to the digging of the heath for coneys, ſaid, that E. 3. granted to the Dean and Cannons of Windſor, that they and their ſucceſſors haberent in omnibus terris dominicalibus liberam Warrennam ſibi tunc et ſucceſſor. et in poſterum conferendam. And that the 20. E. 4. the Duke of Suffolk and his wife granted to them the ſaid Manner of Layton; whereof the ſaid Heath is parcel, and ſaid that 22. E. 4. it was enacted by Parliament, that all charters made by King E. 3. to the Deane and Canons of Windſor ſhall be good, and that the ſaid Deane and Cannons of Windſor being ſo ſeiſed of the Manner of Layton, and of the Heath in the 3. H. 7. erected a free warren, and that by mean conveyance the ſaid D. and C. conveyed that to the Defendant, and ſo juſtified the making of the ſaid coney borroughs, by vertue of the charter of E. 3. and as to the 600. acres of wood he juſtified by the licence of the father of the Plantiff, who then was ſeiſed of the common, and upon theſe pleas in barre the Plantiff demurred; and Serjeant Richardſon took exception; becauſe that it is not expreſſly alleadged that hee was ſeiſed of the houſe and land, to which the common is appendant at the time of the making of the conney borroughs, for he only ſaid that a long time before the erection of the conney borroughs, and yet he is ſeiſed, which immplies that he was ſeiſed, before and after, but not at the time of the

the warren made, and for this he cited the Book of entries where waſte was brought, and he counted of a leaſe for life to the Defendant and a grant of the reverſion, and an attornment of the Tenant, and that the Defendant had made waſte, and ruled to be evil, becauſe he had not alleadged that this was after the attornement, and ſo in Stradlings and Morgans caſe; and he cited a judgement, 5. Iac in C. B. Adkinſon brought an action of treſpaſs againſt I. S. and declared quod per multos Annos jam preteritos he had exerciſed marchandize, and that the Defendant ſuch a day ſaid of him that he was a Bankrupt; and it was adjudged that the declaration was evil, becauſe he had not alleadged that he exerciſed marchandize, at the time of the ſpeaking of the words, and he ſaid that the cauſe of the judgement was entered upon the roll, and the ſame caſe he could ſhew to the Court: and Hobert deſired to ſee that, for he doubted much of the law of the ſame caſe, to which Winch and Hutton agreed, and Richardſon ſaid, that as to that which may be ſaid, that a fee ſimple ſhall alwayes be ſuppoſed to have continuance if the contrary is not ſhewed; to that he anſwered that is not ſo, for the book of the 7. H. 7. 8. if in barre of aſſiſe, the Tenant ſaid that I. S. was ſeiſed and gave, this is not good becauſe he had not ſhewed quod ſit ſeiſitus exiſtens dedit &c. which being in a plea in barre, is more ſtrong then in a declaration, to prove that a fee ſhall not be intended to have continuance without an expreſs allegation: and ſo he concluded that the declaration is naught: but by Hobart, Winch, and Hutton, it is very good notwithſtanding this objection, and Winch cited the 13. Eliz. in Ejectione firme, where the life of the perſon was not clearly alleadged, but the declaration only was that the leſſor was, and yet is ſeiſed, which was a ſufficient averment of the life of the perſon, and ſo the declaration is good, and another exception was taken to the declaration by Hitcham Serjeant, becauſe that the Plantiff had declared that the Defendant had made coney borroughs, and with the aforeſaid conneys had eat up the graſs, where he had not alleadged any ſtoreing of the coney borroughs before with coneys, and then it is impoſſible they ſhould eat up the graſs to the prejudice of the Plantiff, but to this it was anſwered by Serjeant Attoe, that though the declartion as to that is naught, yet the diging of the coney borroughs is to his prejudice, and ſufficient to maintaine the action, which the Court granted: and as to the matter in law Attoe argued for the Plantiff, and recited the caſe to be that, E. 3. granted to the Deane and Chapter of Windſor, that they ſhall have free warren in the lands which yet they had not purchaſed, and of which they were not ſeiſed at the time, whether this is a good grant, and ſhall extend to take effect after the purchaſe; ſee Buckleys caſe: and he argued that it is not a good grant, and he put a difference between a warren, and other privileges which are flowers of the Crown, which may be granted infuturo: but a warren never was a flower of the Crown, and for that reaſon a grant de bonis et catallis fellon. et fugitivorum may be granted, and yet not be in eſſe at the time of the grant, for it is a flower of the Crown, and it is ſaid 44. E. 3. 12. that the King may not grant a warren in other mens lands, but only in the land of the grantee, and upon this he concluded that this grant ſhall not extend to land after purchaſed, and the rather becauſe it is in the nature of a licence which ſhall be taken ſtrictly, ſee 21. H. 7. 1. 6. —— And Hobert chief Iuſtice ſaid, that this word demeans is derived of the French words en ſon manies, and though the Lord of the mannor had the waſte in his hands; yet he had not the common: and as to the confirmation by Ed. 4. they all agreed that this will confirm nothing to him but what was granted by E. 3. himſelf; and then as to the licence pleaded that is of no effect, for firſt the licence is pleaded to be made to one Sir Cha. Haydon, and the Defendant did claime under him, and this licence was made by the father which will not binde the ſon who had the land, to which the common is appendant after the death of his father, for a common may not be extinguiſhed without deed; and Hobert and all the Court agreed, that the licence of the father will not binde the ſon; and by the Court if

Mich. 19. Jac.

Mich. 19. *Jac.* nothing is ſhewed to the contrary within a week, judgement ſhall be given for the Plantiff.

Davies againſt *Turner.*

J.D.656.pl.1.
J.Brownl.172.

DAvies brought a replevin againſt Turner, and he declared of the taking in a place called the Holmes, and the Defendant made conuſance as bayliff to Sir George Bing, for that one Clap held certain land of him by 20. s. rent and ſuite of Court, and for the rent he avowed, and alleadged ſeiſin by the hands of Clap, the Plantiff ſaid, that Chap held 40. acres of land by 9. s. rent, ſealty, and ſuite of Court, abſque hoc that he held modo et forma, and upon this it was demurred; and the ſingle point was this, in auowry the Tenant alleadged &c. and the queſtion is whether he ought to traverſe the tenure, or the ſeiſin, and it was argued by Henden Serjeant, that he ought to traverſe the ſeiſin, and that the traverſe of the tenure is not good, and beſides here is double matter, for the concluſion ſounds in barre of the avowry, and in abatement of the avowry: ſee a good caſe 18. H. 6. 6. for the falſneſs of the quantity of the land, and the falſneſs of the quantity of rent, the on goes in barre, the other in abatement of the avowry, 47. E. 3. 79. 5. H. 6. 4. and affirmed for good law.

And as to the ſecond point he held the ſeiſin to be traverſable, and not the tenure, and firſt he ſaid there was a difference between pleading in barre of avowry, and in the abatement of the avowry, for in barre of the avowry there the ſeiſin is is not traverſable by Frowick 21. H. 7. 73. which opinion he held for good law: for it is agreed in Bucknels caſe, *Co.* 9. he may not ſay that he held of a ſtranger, abſque hoc that the avowant was ſeiſed, but otherwiſe it is when that goes in abatement of the avowry.

Secondly he ſaid that the ſeiſin is the principal thing, and the principal thing ought to be traverſed, for if a man had ſeiſin of many ſervices, ſeiſin ſhall never be ayded till the Stat. of magna charta: ſee Bucknels caſe Cook 9. and here the ſeiſin is the moſt meterial thing, and the moſt proper; ſee 37. H. 6. Bro. —— Avowry 76. ne tiendra is no plea for a ſtranger to the avowry, but he ought to anſwer to the ſeiſin.

Thirdly the cauſe for which the ſeiſin is traverſable, ſee a notable caſe per Danby 7. E. 4. 29. for the beginning of the ſervices may be time beyond memory &c. and for that reaſon may not be tried: ſee 20. E. 4. 17. 22. H. 6. 3. 26. H. 6. 25. by Newton he may traverſe the tenure: Attoe contrary 13. H. 7. 25. to this it was anſwered, that the number Rolle may not be found: 5. H. 7. 4. 13. H. 6. 21. 21. H. 7. 22. by Frowick; and Kingsmil: Harvey to the contrary, the caſe was that the Defendant made conuſance as Bayliff to Sir George Bing for this, that Chap held a meſſuage &c. by certain rent, and by ſuite of Court; and the other ſaid, that he held 40. acres by 9. s. and ſuite of Court, abſque hoc that he held the meſſuage, and the land modo et forma, and he argued that it was a good traverſe of the tenure, and not double, which was granted by Hobert and by Winch being only preſent, and Hobert ſaid, true it is that if the Lord had ſeiſin of more then the very ſervices, in this caſe it may not be avoyded in avowry, and no falſ tenure ſhall be avoyded &c. but when he joyns another falſity, and that is in the quantity of land, now the falſe quantity of the rent had made the tenure traverſable, and the judgement was commanded to be entred accordingly.

Thomas

Trin. 19. *Jac.*

Thomas Bull Executor &c. againſt *Fankeſter.*

THomas Bull Executor of William Bull brought an action againſt Fankeſter; and declares that the Defendant enfeoffed his Teſtator in certaine land, and that he covenanted for him and his heirs, that he was ſeiſed of a good eſtate in fee, and he alleadged the breach, upon which they were at iſſue, and now Attoe moved in arreſt of judgement, firſt becauſe the Plantiff ſueing as Executor had not ſhewed the Will, for it hath been adjudged here, that if a man bring an action as executor, and do not ſhew the Will, that the Defendant may demurre upon that, becauſe it is matter of ſubſtance: but Hobert ſaid it is very good; becauſe the Defendant had admitted him to be reſponſible, but it is true he might have demurred upon the declaration, as we often times adjudged here; ſecondly Attoe ſaid, that the covenant being made with the heire, the executor ſhall not have an action of covenant, for it is annexed to the land, which was granted by Hobert and Winch being only preſent in the Court.

Note that it was ſaid at the barre and agreed, by Hobert, that if the debtor make the dettee his executor, he may now retain in debt againſt him, and ſafely plead plene adminiſtravit, if he had no other goods, and ſhall not be driven to his ſpecial plea, and ſo it had been agreed often times in this Court.

Parſon, and *Morlees* caſe.

PArſon and Morlees caſe, it was ſaid that the Lord Chancellour preſented to a benefice, which belonged to the King, which was above the yearly value of 20. l. per annum, and this was referred to Hobert chief Iuſtice, and to Tanfield chief Barron, to certifie whether this was meerly void; it remained good till it was avoyded.

Harris againſt *Wiſeman.*

HArris had procured a prohibition againſt Wiſeman, who had libelled in the ſpiritual Court againſt the Plantiff for a ſeat in the Church, which did belong to his houſe, and it was ſaid by Hobert and Winch only preſent, that a man, or a Lord of a mannor, who had any Iſle or a ſeat in the Church &c. and he is ſued for that in the ſpiritual Court, he ſhall have a prohibition, but not every common parſhioner for every common ſeat, and upon the firſt motion at the barre in this caſe, day was given over to the Defendant, to ſhew cauſe wherefore that a prohibition ſhall not be granted: and the Defendant not having notice of that, after the day the Plantiff had a prohibition, and now after the day he ſhewed a good cauſe, and upon that a ſupерſedeas was granted to ſtay the prohibition in that caſe.

Ayleſworth againſt *Harriſon.*

AYleſworth againſt Harriſon in debt againſt an executor, the queſtion was whether he may plead plene Adminiſtravit, and give in evidence a debt, in which the Teſtator was indebted to him, or whether he may plead the ſpecial matter, that plea amounting but to the general iſſue; and it was argued by Harris Serjeant, the Defendant may plead the ſpecial matter, and ſhall not be bound to the general iſſue, to leave that to the lay people who may ſuppoſe ſuch a retainer to be an adminiſtration: and he vouched the 15. E. 4. 18. if a man illiterate ſeale a deed which is read to him in another manner, &c. and he delivers that as an eſcrow to be delivered over as his deed upon conditions performed: and this is delivered over before the conditions performed, he may in this caſe plead the ſpecial matter, and conclude ſo not his deed, or if he will he may plead the general iſſue,

Tr. 19. *Jac.*

of non eſt factum: and ſo is 39. H. 6. in dower, the Tenant ſaid that before marriage the husband infeoffed him, and that after the Tenant let to him at Will, and that the husband continued poſſeſſion during his life, abſque hoc that he was ſeiſed of ſuch an eſtate of which ſhe might have dower: and exception was taken there, becauſe that this only amounts to the general iſſue, and yet ruled to be good for the lay people may conceive ſuch a continuance of poſſeſſion during the life of the leſſee, to be ſuch an eſtate of which the wife may have dower if this were put upon the general iſſue; and in our caſe, becauſe he had liberty to plead ſpecially, or generally, he prayed that the Defendant may be admitted to plead ſpecially, and that he may not be bound to the general iſſue: Serjeant Hendon to the contrary, if one plead a plea which amounts to the general iſſue, ſee Layfields caſe, Coo. 10. and though in Woodwards caſe commentaries; there was ſuch a plea pleaded, yet this doth not prove the contrary, for in the ſame caſe no exception was taken by the Plaintiff: and preſidents do prove that the Defendants in this kind have been compelled to plead the general iſſue; Hobert, if no ſpecial matter may be alleadged to the contrary, the Defendant ſhall be compelled to plead the general iſſue, and this is good diſcretion in the Court, to take away the perplexity of pleading, becauſe one plea is as good as the other: to which Winch being only preſent agreed, and it was ordered that the Defendant here plead accordingly.

Forger v. Sales.

3. Dan. 336. pl. 45. S. C. *Cro. Car. 147. S. C.* *3. Jon. 199. S. C.*

In debt againſt the heire upon the obligation of his father, and in the declaration on the Plaintiff omitted theſe words, obligo me et heredes meos &c. and after error brought, the Plaintiff prayed that this might be amended, becauſe it was the miſpriſion of the Clark only: Hobert and Winch ſaid, that this ſhall not be amended, for it is a matter of ſubſtance, but becauſe the clark who made this miſpriſion was a good clark, day was given over &c.

Widdow Archers caſe.

IN debt againſt the Widdow of Archer being executrix of her husband, and the Plaintiff declared that neither the Teſtator in his life, nor the executrix after his death had paid that, omitting thoſe words licet ſæpius requiſitus: &c. and evil, but this omiſſion was amended.

Sir *Edward Grubham* againſt Sir *Edward Cooke*.

Poſt, 23.

SIr Edward Grubham brought an audita querela againſt Sir Edward Cooke upon a recognizance of 4000. l. and this was acknowledged to the uſe of his Mother, and ſhewed that the conuſor had infeoffed him, and another in the land, and that the conuſee had ſued execution only againſt him; and it was found for the Plaintiff, and it was ſo moved in arreſt of judgement by Aſhley Serjeant, firſt becauſe he had not ſhewed in this audita querela when the Statute was certified, nor yet the Teſte, nor yet the return of the writ of extent: ſecondly the Plaintiff had not ſhewed himſelf the party agrieved, becauſe he had not ſhewed an ouſter, and before an ouſter no audita querela lyes for the purchaſor, but otherwiſe for the heir; as 17. aſſiſe 24. Hobert and Winch only preſent, the liberate is an ouſter of it ſelf.

Empſon againſt *Bathruſt*.

Poſt. 50.

Hutt. 52. *Poph. 176.*

EMpſon againſt Bathruſt in an action of debt upon an obligation of 23. l. the condition was to pay 20. l. and the Defendant pleaded the Statute of the 23.

of

of H. 6. cap. 10. that no Sheriff may take an obligation by colour of his office in other manner or form then is there preſcribed by the Statute, and he ſhewed that a Statute of 200. l. was acknowledged to him, the Defendant by I. S. and that this was extended by the Plantiff being ſheriff; and that it was agreed between one Charles Empſon brother to the Plantiff, and the under-ſheriff before the liberate executed, that the Defendant ſhould enter into the ſaid bond to the uſe of the Plantiff, the Plantiff confeſſed this, and pleaded the Statute verbatim; where upon the Defendan demurred, and Hendon argued for the Defendant, and ſaid there is 3 points in the caſe: firſt when the ſheriff doth take an obligation with penalty for money which is given to him for his fees which are due by the Statute of the 29. of Eliz. whether this be good within the Statute: the ſecond point is, when the Sheriff extends the Statute, and the conuſee enters into bond for the payment of his fees after the extent, and before the liberate returned, whether this is good: and thirdly where the Satute gives 12. d. in the pound for the firſt 100. l. and if that exceed, then but 6. d. whether this ſhall be taken but only 6. d. in the pound for all, that exceeds a hundred pound, or whether he ſhall have 12. d. for the firſt 100. l. and 6. d. for the reſt: and if any of theſe 3. points be againſt the Plantiff, he ſhall not have judgement. And firſt Hendon argued that this bond with penalty is out of the Statute, of the 29. Eliz. for firſt in our caſe the bond is void, by the 23. H. 6. for it is taken to another, and not to the Sheriff, and beſides the ſame Statute doth not extend to any obligation with penalty, and then it never was the intent of the 29. of Eliz. that any other ſhould be taken, or after another manner, and the Statute of the 23. H. 6. was made only to prevent the extortion of the Sheriffs, and of their officers, as may appear by a particular recital of the Statute: and yet he agreed that by the equity of the ſame Statute, he ſhall have 4. d. for every warrant as appears by the new book of entries: and then he ſaid, if the Sheriff take other fees, or in other manner it is extortion: and for that by 21. H. 7. if he takes an obligation, or covenant which tends to extortion, the law will meet with that, and he relyed much upon Manninghams caſe Com. 65. where it is ſaid, the Sheriff may take a bond, with a great penalty for the appearance of the party, but not for his fees by the Stat. of 23. H. 6. for that Stat. as to fees is not repealed by the 29. Eliz. and ſo he concluded this bond with penalty for his fees was extortion, and void by 23. H. 6. which is not repealed by the 29. Eliz. and by conſequence void, for that Statute was not made to puniſh them, but to prevent all extortion in them; and this Statute is penned ſtrictly to prevent any thing which had but any colour of extortion, like to the Statute of the 13. of Eliz. cap. 8. againſt uſury, if any evaſion be made by any indirect dealing to avoid this, yet the Statute will meet with that, as appeares in Claytons caſe: and for that reaſon he concluded this bond with a penalty to be void. Trin. 19. *Jac.*

But admitting the bond to be good, the Sheriff had not taken that in due time, for before the liberate there is no compleat execution, but otherwiſe in the caſe of a Statute Merchant, for there needs no liberate of it ſelf: ſee the books of entries 59. the difference agreed, by which it is apparent that before the liberate there is no compleat execution, and the words of the 29 of Eliz. are for the ſerving and the executing &c. ſo that before execution the Sheriff ſhall have nothing, for this word (for) implies a condition precedent, as an annuity pro conſilio impenſo; he ought to ſhew that he had given counſel; and yet it is true that this Statute of the 29. Eliz. hath made a contract between the Sheriff, and the party that hath execution, and he may have his contract, for it is a contract in law, and ſo it was reſolved, but he ſhall not have that before execution, as was holden, Paſch. 14. Iac. Rot. 5. 39. B. R. Pierpoint againſt Bowley, that the Sheriff ſhall be bound to redeliver the fees to the party, if it be not fully executed, by which it is apparent, that before execution no fees are due to the Sheriff; and as to the third, he argued that the Sheriff ſhall have only 6. d. in the pound when that exceeds a hun-

Trin. 19. *Jac.*

hundred pound, for the intent of the Statute is to put that incertainty, and not to make fractions; but it will be objected the inconvenience that will enſue upon this conſtruction, for then the Sheriff ſhall have as much for the executing of 100. l. as for 200. l. to this he anſwered that this may well be, for it is the words of the Statute: and for authority in that point he cited the caſe of Foſſet and the Sheriff of Nottingham Paſch. 36. Eliz. Rot. 1301. where this very point came in queſtion, indeed no judgement was given in the caſe, but the opinion of the Court was as he had argued: and ſo he praied judgement for the Defendant; Bawtry Serjeant to the contrary, and he argued briefly as to the firſt point, that the obligation with penalty was taken for due fees, for it is a due debt, and then what reaſon is there that he ſhall not take an obligation for a due debt: and as to the ſecond point he argued that the bond was well taken before execution, for the words of the Statute are that the Sheriff ſhall not take of any, either directly or indirectly, for that which he ſhall leavy or extend in execution &c. and this word (for) implies a taking before or after 21. H. 7. ſaith that the priſoner ſhall be diſcharged paying his fees, and this payment ought to be before diſcharge, and the common law ſaid that an hoſtler may retaine a horſe for his meat, in this caſe payment ought to be for his meat before the delivery of his horſe: and Coo. 5. Graies caſe, there Popham ſaid if a man had pot water by preſcription paying 6. d. in this caſe he ought to pay before he hath the water, for otherwiſe the owner had not any remedy, and ſo here he doubted that when the Sheriff made execution whether he ſhall have any remedy or no: and therefore it is good conſcience to allow him to take a bond for that before he make execution, for otherwiſe a great inconvenience may inſue, for perchance after the extent, and before the liverate, the parties may agree, and then the Sheriff ſhall not have any thing for all his paines which he had taken in the extent, which never was the intent of the Statute, but it may be objected that in this caſe the Sheriff may have an action upon the caſe againſt the debtee, or the conuſee if he make ſuch compoſition, I anſwer, yet this is a great hinderance, and trouble to the Sheriff to proſecute the ſuite, and it ſhall be very inconvenient to allow that the Sheriff ſhall be allowed no other remedy: and then for the third point he argued that the Sheriff ſhall have 12. d. in the pound for the firſt 100. l. where the bond exceed 100. l. and 6. d. for that which exceeds, for otherwiſe as the caſe is he ſhall have nothing at all for the firſt hundred pounds, for the words of the Statute are, if the ſame be above 100. l. then he ſhall have 6. d. ſo that 6. d. only ſhall be taken for that which is above 100. l. and nothing for the firſt hundred if this conſtruction ſhall be made: and he alſo remembred the objection made by Hendon, and ſo concluded that judgement ought to be given for the Plaintiff: Hobert ſaid clearly, the Sheriff may take a ſingle bill for his fees, and that is the ordinary courſe, alſo he read the Statute of the 29. Eliz. that it ſhall be lawful to the Sheriff &c. and ſaid the words of the Statute made a contract in law, for which an action of debt lyes for the Sheriff, and he ſaid to Serjeant Bawtry that the ſecond point will be found to be againſt him, and for the third point that the Sheriff ſhall have but 6. d. for all in the caſe the ſumme exceed 100. l. and ſo they thought judgement ought to be given for the Defendant; and Iuſtice Winch ſaid that the reaſon wherefore the ſumme of 12. d. in the pound is given if that not exceed 100. l. is, becauſe that it is as much labour to the Sheriff, to execute 100. l. as it is for 500. l.

Maps and *Maps* againſt Sir *Iſaac Sidley*.

1. Dan: 55. pl. 45. S. C.
Cro. Jac: 682. S. C.
Hutt: 46. S. C.

MApps and Mapps brought an action upon the caſe againſt Sir Iſaac Sidley upon a promiſe; and ſhewed that one named Holdiſh was indebted to the Teſtator of the Plaintiffs in 12. d. upon a bond which became due, and that the Defendant in conſideration that the Plaintiffs will forbear to proſecute a ſuit upon the

ſame

ſame obligation, he promiſed to pay that; and the Plaintiffs ſhewed that they had forborn him till ſuch a day &c. and upon non aſſumpſit pleaded it was found for the Plaintiff, and now it was moved in arreſt of judgement by Hitcham Serjeant of the King, that this declaration is not good, for this forbearance ought to be for ever, and not a temporary forbearance only, for the Defendant by his promiſe had made the debt his own, as if the aſſumpſit & promiſe had been to forbear to come to my houſe, this ought to be a perpetual forbearance; and here the aſſumpſion of the Defendant amounts to a releaſe in law to the principal, and yet he agreed if this had been generally that he had forborn, and had not ſhewed he had forborn till ſuch a day, the declaration had been good: Hobert, if the promiſe had been to forbear till ſuch a day, there he may ſue the dettee if he do not pay it the day, and it was adjourned. Mich. 19. Jac.

Mabies caſe.

MAbies caſe, Hobert in Parſon Mabies caſe if I let my rectory excepting my glebe, the exception is void, for no rectory may be without glebe: and the ſame law of a mannor excepting the demeaſnes, but he may except parcel of the glebe, and good, but in pleading the leaſe of a rectory this ſhall be taken for the whole rectory, and not for parcel.

Gratwick againſt *Gratwick*.

GRatwick brought a formedon in remainder againſt Gratwick, and the Tenant pleaded that the day of the purchaſe of the writ, and yet he the Plaintiff is ſeiſed of the moity of the land in demand; and it was argued by Serjeant Harvey that this is no good plea, for he ought to ſhew of what eſtate he was ſeiſed, and he may be ſeiſed by vertue of a Statute, and he vouched the 39. E. 3. 7. Hobert, if he had ſaid that he was ſeiſed in his demeaſne as of fee, or as of freehold, this had been good, and a ſeiſin by force of a Statute is no ſeiſin at all: and Hutton ſaid, if Tenant plead entry in part pending the writ, he ought to ſay that he entered, and expulſed the other, for otherwiſe it is not good: and I conceive that the Court inclined that in the principal caſe, that the plea for the cauſe aforeſaid, being of a general ſeiſin was not a good plea.

Sir *Edward Grubham* againſt Sir *Edward Cooke*. *Anke*, 20.

AT another day the caſe of Sir Edward Grubham and of Sir Edward Cooke was moved againe, and it was objected by Aſhley, that the declaration in the audita querela is not good, becauſe he had not ſhewed the day of the Teſtee, and of the return of the writ, & execution in certainty, but only by proceſs ſuch a day out of the Chancery, which is not good, but he ought to plead all the record of the extent in ſpecial; and he offered to ſhew a preſident of that: and ſecondly he had not ſhewed the execution of the liberate by which the land was delivered, and ſo there is no expreſs allegation of a grievance: Richardſon the preſidents in the old book of entries are according to our declaration: and Hutton vouched the 9. H. 6. and 39. H. 6 and in an action of debt upon a judgement, he needs not recite all the record, but he may begin at the judgement: and as to the ſecond point they all agreed, that the party may have an audita querela before an ouſter; and yet here the ſhowing that it was delivered to the conuſee by the liberate is a ſufficient averment of the ouſter, for it may not be delivered without an ouſter; and ruled that the Plaintiff ſhall have judgement if the Defendant do not ſhew other cauſe by ſuch a day. 1. Dan. 631. pl. 6. S. P.

Upon

Mich. 19. *Jac.*

Upon a Capias Vtlagatum the ſheriff returned that the party which was arreſted, had a protection from Lord Stafford, who was a Lord of the Parliamen: and it was moved by Serjeant Hitcham that the return was not good, for the protection of a Lord of the Parliament is not good in a Capias Utlagatum, which concerned the King; and by Winch Iuſtice only preſent in Court, the return is cleerly naught: and day was given over to the Sheriff to amend his return: and this was granted by Hobert chief Iuſtice, at another day this Term,

Peter Vanheath againſt *Turner.*

Moll. 267.

PEter Vanheath brought an action againſt Turner, and declared upon the cuſtome of Merchants, that if any Merchant over the ſea deliver money to a factor, and make a bill of exchange under his ſeal, and this is ſubcribed by the Mr. or by any of the company of ſuch Merchants, that the Merchant himſelf, or all the company, or any one in particular may be charged to pay that; and he ſhewed that one Morgan was factor of the company of which the Defendant was one; and that the ſaid Morgan did ſubſtitute one Greenway, to whom the Plantiff delivered 100. l. upon a bill of exchange, to which bill one Bounder being one of the company ſet to his hand in England; and ſo the action accrewed to the Plantiff.

The Defendant pleaded nihil debet per legem, and upon that the Plantiff demurred in law; and the queſtion was whether the Defendant may wage his law, and it was argued by *Serjeant* Harvey that he ſhall not wage his law, for this is only an action upon the caſe, and ſounds only in nonfeſance, and here is no privity between the Plantiff and Defendant; for the bill was made over the ſea, and ſubcribed here in England, and he ſhall not charge the Defendant without a ſpecial cuſtome, ſo that it is plaine that it is cuſtome which made the Defendant lyable, and if the Defendant do not pay for this no action of debt lyes, but only an action upon the caſe: and every plea ought to conclude to the point in action: and for that in trober and converſion non culp. is a good plea: and yet he may traverſe the finding, for this tends to the iſſue, and is good; and ſo in delt upon a leaſe for years, nihil debet is a good plea, or non dimiſit, for the cauſe aforeſaid, but when the plea doth not tend to the point in iſſue, it is otherwiſe, for he ought to traverſe that which tends to the point in iſſue, and in our caſe the Defendant may traverſe the cuſtome, or give anſwer to the nonfeſance, but he ſhall not wage his law; and an action lyes upon this contract againſt the Mr. for this, and ſo he concluded that judgement ought to be given for the Plantiff.

Harris Serjeant contrary; this non payment is not a non feſance in the Defendant; and here the Defendant may not plead not guilty, or non aſſumpſit, for no promiſe was made, and it is a general rule in law, that where a man may traverſe the conveyance, there he ſhall not wage his law: ſee 5. H. 7. but here the Defendant may not traverſe the conveyance, Ergo he may wage his law, and 5. H. 7. the ſucceſſor of an Abbot ſhall have his law of a contract made with his predeceſſor, and he ſaid that the book of the 23. E. 3. is not law. Hobert chief Iuſtice if the Bayliff at the common law make a ſubſtitute, the ſubſtitute is not chargeable, but here the cuſtome will bind the law. Secondly he ſaid 2. or 3. Merchants trade over the ſea who made a factor there, who takes money there, and gives a bill, and this is ſubſcribed by one of the company, that this ſhould bind all or any of the company is not a good cuſtome, and the cuſtome of Merchants is part of the common law of this Kingdome, of which the judges ought to take notice: and if any doubt ariſe to them about there cuſtome, they may ſend for the Merchants to know there cuſtome, as they may ſend for the Civillians to know there

there law, and he thought that the Defendant ought to be admitted to wage his law, for the delivery of the money made a contract in law, and as he may have an action of debt, ſo without queſtion he may have an action upon the caſe, and is come upon a promiſe, and then the Defendant may not wage his law. Mich. 19. Jac. C. P.

Doctor Hunt againſt *Allen.*

DOctor Hunt brought an action of debt upon an obligation of 100. l. againſt the heire of Edmond Allen, and the condition of the obligation was, that whereas the teſtator Edmond Allen in the firſt year of the raigne of the King, hath given and granted to the Plantiff the preſentation to the Church of D. if therefore the ſaid Edmond Allen, from time to time ſhall make good the ſaid grant from all incumberances made, or to be made by him, and his heirs, that then &c. and the grantor dyed, and the Church became void: and the heire of the grantor preſented, and whether this was a breach of the Condition, was the queſtion; and Hobert chief Iuſtice and Winch being only preſent, thought this tortious preſentation to be no breach of the condition, but this extends only to lawful diſturbance by the heire, and by the pleading here it appears, that though the heire preſented, yet he had no right to preſent, becauſe that his father had granted that before: and then the preſentation of the heire is as a meer ſtranger. And thoſe general words will not extend to a tortious diſturbance by the heire: but Hobert ſaid, that the words ſhall have ſuch a conſtruction as if it had been ſaid, that he ſhall enjoy the ſame, from any act or acts made by him, or his heires: and in this caſe there ought to be a lawful eviction to make a breach of the condition: but otherwiſe if the condition had been that he ſhall peaceably enjoy from any act or acts made by him, or his heires, in that caſe a tortious diſturbance would have been a breach of the condition, but it was adjorned till another time.

Information was for that one ſuch, his apprentice, departed out of his ſervice, and the Defendant received and retained him without a teſtimonial from the Mr. contra formam Statuti. And ſo he demanded 5. l. the Defendant pleaded nihil debet per patriam, and it was found againſt him: and now Hendon Serjeant moved in arreſt of judgement, that an apprentice is out of the clauſe of the Statute of the 5th. of Elizabeth; and that the ſame Statute extends only to ſervants, and to labourers retained within that Statute, for the ſtatute ſaith, be it enacted that no perſon or perſons that depart out of ſervice without ſhewing of a teſtimonial, as is above remembred, and this branch as is above remembered, had only reference to the next clauſe before, and the ſame branch before makes only mention of certaine trades, in which an apprentice as in our caſe is not included: and the certificate ſet down within the Statute, proves that an apprentice is not within the Statute, for the words are I. W. ſervant to ſuch a one &c. and ſo it extends to ſervants, and not to apprentices; and ſecondly, he ſaid the information is not good, becauſe he had not ſhewed in what trade this apprentice ſerved: and perchance he was retained in ſuch a trade as is not within the Statute: and thirdly, he had not ſhewed what time he was received, that ſo it might appeare that he was an apprentice but for half a year: and ſuch a retainer is not within the Statute, fourthly, the concluſion of the information is contrary to the form of the Statute; yet this doth not aide the imperfection of the information, for ſuch information only extends to matter of circumſtance, and not to matter of ſubſtance. Finch Serjeant contrary, that the retainer of an apprentice who departs out of the ſervice of his Mr. without a teſtimonial, is within the Statute of the 5th. of Eliz. for the ſame branch is general, there being no perſon who departs &c. and an apprentice is a perſon which departs; ſecondly, the clauſe of the Statute is, be it enacted that none of the foremencioned retained perſons &c. and an apprentice is a perſon

Mich. 19. *Jac.*

which is in a ſpecial manner named before, and therefore he is within the expreſs words of the ſame branch. Thirdly, the form of the teſtimonial proves that, for it is I. W. ſervant to ſuch &c. and an apprentice is ſuch a ſervant. Hobert chief Juſtice ſaid, that it was never the intent of the Statute, to make an infant who is an apprentice, to be within the danger of the ſame Statute, for an infant at the age of 14. years may be bound to be an apprentice: and the puniſhment which is given by the ſame Statute is, that ſuch perſon ſhall be whipt as a Rogue, which plainly proves the Statute, intends only thoſe who are of full age: and if other conſtruction ſhall be made, perchance that the ſonne of a gentleman may be puniſhed as a Rogue by ſuch departure: and he held that if an apprentice depart with his Mrs. goods delivered to him, that in this caſe he is not within the Statute of the 21. H 8. as another ſervant is; and Serjeant Finch ſaid, that there is an expreſs exception, and if that had not been, that an apprentice had been within the danger of the law; but Hobert ſaid, that he doubted much whether an apprentice had been within that Statute, though the Proviſo had not been made, but this proves that the makers of the Statute, thought this to be a hard matter to make an infant who is apprentice to be within the danger of the ſame law: and for that reaſon the proviſo of the Statute was made. Winch ſaid to which Hutton agreed, that when the Defendant had pleaded nihil deber, and this was found for the Plaintiff; yet he may move in arreſt of judgement, if the matter be not within the Statute adjurned.

In a replevin the Defendant ſaid, that he had property in the beaſts abſque hoc that the property was to the Plaintiff, and ſo prayed judgement of the writ: and it was found for the Plaintiff: and now Harvey Serjeant moved in arreſt of judgment, for in no book is found ſuch a traverſe as this, that the Plaintiff had not property, but only that the property was to the Defendant: and ſecondly the concluſion of the plea is not good, for he ought to conclude to the writ and not to the action. Hobert 6. H. 7. is, that an action of detinue affirmes the property at the time of the action, but a repleviant the time of the taking: and two men may have ſuch property in the ſame thing, that every of them may have a replevin; and Hutton ſaid that when the Defendant in the replevin claimes property, he ought to conclude to the action: and Hendon Serjeant being only at the barre, and not of councell in the caſe ſaid, that the book of entries is, that he ſhall traverſe the property of the Plaintiff, as in the principal caſe. Hutton Juſtice ſaid, that this was never ſeen by him: but they all agreed that this being after verdict, judgement ſhall be given for the Plaintiff.

Trehern againſt *Claybrook* Ent. Tr. 18. *Jac.* Rot. 650.

+ Poſt 69.

2. Dan: 89. p. 12. S. C. 2. Ro. Rep. 382. Hutt. 68. 1. Jon. 43.

TRehern againſt Claybrook in a debt upon a leaſe for yeares, the jury gave a ſpecial verdict to this effect, that Iohn Trehern Grandfather of the Plaintiff was ſeiſed of land in fee, and let this for forty yeers rendring rent, for which the action is brought, and that he deviſed the reverſion to the Plaintiff in taile, the remainder to Leonard Trehern in taile with divers remainders over, and with proviſes in the ſame will, that for the raiſing of a ſtock for the Plaintiff, and for him in remainder, his will was that one Griffith, and Anne his wife, being daughter of the deviſor ſhould have the profits, and rent of the ſaid land to their own uſe, until the time that the Plaintiff and the ſaid Leonard Trehern accompliſh the age of 21. years, provided always, and upon this condition, that the ſaid Griffith and his wife within 3 moneths of his deceaſe, enter into bond to the overſeers of his will in ſuch a ſumme, and in ſuch a penalty as ſhall be thought fit by the ſaid overſeers: and this bond to be made by their advice; and if the ſaid Griffith and Anne his wife do refuſe to be bound as is aforeſaid, then the overſeers ſhall have

have the rents, and the profits &c. and the jury found over that he made two executors and 3. who were overſeers, and that the 3. October 16. Iac. died, and that within 3. weeks after the death of the deviſor, the executor read the will to the overſeers, but they found that the overſeers did not remember that; and if upon all the matter Griffith and Anne his wife had not performed the condition was the queſtion: and that if not, the reverſion was in the Plaintiff. And the point in law upon the verdict was whether Griffith and Anne his wife, ought of their perils to tender the bond within 3. moneths, or whether the overſeers ought to make the firſt act, and to tender the bond and the penalty for them to ſeal; and Towſe Serjeant argued that Anne and Griffith her husband ought to tender the bond at their peril, for he ſaid, that the condition did precede the eſtate, and therefore if they will have the benefit of the deviſe, then he ought to tender the obligation; and vouched Corbets caſe, and 18. Eliz. the deviſe of land upon condition to pay money, he ought to pay that at his perill: Attoe Serjeant contrary, and yet he agreed, that if the condition was to precede the eſtate, then the law was as Towſe had ſaid, but here he ſaid the eſtate precedes the condition, for all the profits are deviſed to Griffith and to Anne his wife during the minority of the Plaintiff, by which it is apparent the eſtate is preſently in the deviſees; and by conſequence the eſtate precedes the condition; and then the ſole doubt will be whether Griffith and Anne his wife ought to procure the overſeers to make the obligation, and to limit the condition, or whether the overſeers ought to make this firſt, they being the parties truſted by the Will: ſee more after. Mich. 19. Jac. C. P.

Upon an elegit the Sheriff returned that to be executed, and the extent of the Church of St. Andrews Alſ. St. Edes, and Attoe prayed the Sheriff may amend this, and make that Andrews only, for that is the true name, Hobert and the Court, if this be the true name the alias dictus is ſurpluſage, and will not hurt the return of the writ.

Allen againſt *Brach* Ent. Hill. 19. *Jac.*

+

ALlen againſt Brach upon the reading of a record in a replevin, the caſe was, Tennat of a Copphold for life, in which the cuſtome was, that the wife ſhall have her widowes eſtate, and the husband was attaint of felony, and executed, and whether the wife in this caſe ſhall have the widowes eſtate, was the queſtion upon the demurrer; Winch being only preſent ſeemed that not without a ſpecial cuſtome. 2. Dan. 674. pl. 2.

In an action upon the caſe, the Plaintiff ſhewed that he was poſſeſſed of a Wind mill ſufficiently repaired, and that he at the inſtance and requeſt of the Defendant let that to I. S. and in conſideration thereof, the Defendant promiſed to pay the rent, and that the Mill ſhould be left in ſufficient repair (except the Sayles,) and he averred that he had let that to I. S. accordingly, and that he had not paid the rent, nor left that ſufficiently repaired: and Serjeant Hendon ſaid, that the declaration is not good, firſt, becauſe that the Plaintiff had ſhewed that he was poſſeſſed of a Winde Mill; and had not ſhewed of what eſtate; and it may be this was only at will, and then the leaſe is void: Hutton Juſtice, it is good, notwithſtanding this exception, for the ſhewing that he was poſſeſſed was ſurpluſage, and if he had ſhewed that he let for years, and never ſhewed that he was poſſeſſed, yet this is good: and if the leſſee never enter, yet the aſſumpſit lyes; ſecondly Hendon moved that the promiſe was to pay the rent, and to leave the Mill ſufficiently repaired except the ſailes, and the Plaintiff averred that he had not repaired, and never made mention of excepting the Sailes; and here the jury found the Defendant guilty of all, and had given entire damages, and it appears

Hill. 19. *Jac.* by the Plantiffs own ſhewing that he ſhall not have any action at all for the ſails, for they are excepted, and therefore though the promiſe is good for the rent, yet it is not for the not reparation, and the damages are intire; Winch and Hutton Juſtices only preſent held this good after verdict; and judgement was given according.

Wright againſt *Black* and *Black*. *Poſt* 54.

WRight againſt Black and Black in an action upon the caſe, and the Plantiff declared that he was of good fame, and that the Defendants ſuch a day and yeare at the Seſſions of Norwich, preferred a Bill of indictment, containing that the Plantiff feloniouſly ſtole two bundles of Vetches, and alſo they maliciouſly incited one I. S. to give in evidence to the grand Jury, that this was Billa vera: and upon not guilty pleaded it was found for the Plantiff, and now it was moved in arreſt of judgement by Serjeant Richardſon, firſt becauſe the Plantiff had not averred in his declaration that the Bill was found, but only that he preferred a Bill of indictment againſt him containing ſuch a thing; and this is not good, as 21. E. 4. 41. one pleaded a patent of exemption, and this was pleaded quod inter alia continetur, and ruled no expreſſe grant was pleaded, and ſo evil: and ſo Browning and Breſtons caſe, Com. 173. there a condition was pleaded, that in ſuch an indenture it was contained, that if ſuch a thing was not made, then the leaſe ſhall be void; and evill, becauſe he had not expreſſly averred what the condition was: and ſo in our caſe, to ſay the Defendants preferred a Bill of indictment containing that the Plantiff ſtole 2. bundles of Uetches, this is only in nature of a recital, and no direct affirmation that there was ſuch an indictment; and this declaration doth not agree with the precedents, and therefore it is evil: ſecondly, admit this to be good, yet as this caſe is, the Plantiff may not have an action upon the caſe, but an action of conſpiracy againſt both. Thirdly, the declaration is not good, becauſe it ſets forth that the Defendants incited I. S. to give in evidence to the grand jury that this was Billa vera: and had not averred that he was ſworn, and then though an action may lye for the other, yet becauſe the action is brought for all; and damages are entire, all ſhall be void, and the Plantiff ſhall not have judgement for any: and laſtly he ſaid the action it ſelf in this caſe will not lye, becauſe the indictment was not found, but only an evidence, and an acquital before the grand jury; and this is lawfull being in an ordinary courſe of juſtice; and prayed that the Plantiff may have judgement in the caſe.

Attoe contrary. Firſt the Plantiff here may not have a writ of conſpiracy, for the indictment was not found, but yet if we ſhould admit that he may have a writ of conſpiracy, yet he may as this caſe is have an action upon the caſe at his election, which was granted by Juſtice Winch as to this point: and yet he ſaid that this action upon the caſe, is in the nature of a writ of conſpiracy, and for that reaſon there ought to be ſome act made, or elſe an action of conſpiracy will not lye upon a bare attempt; Attoe an action upon the caſe will lye upon this attempt, for by this the Plantiff is defamed as much as if the Defendants had ſaid, that he had ſtole 2. bundles of Uetches, and this is more then a defamation by word, and though the indictment was not found, yet an action upon the caſe lyes, as 10. Jaco. B. R. Whorwoods caſe, againſt S. and R. declared that the Defendant preferred a Bill of indictment, containing ſuch a thing without any eo quod &c. and the Bill not found, and yet an action upon the caſe lyes very well: upon this attempt without an expreſs averment of an eo quod, becauſe that the indictment was not found, but otherwiſe it is where the indictment is found, there it is not good containing ſuch a thing as my brother Richardſon had ſaid, without an eo quod, and the ſame caſe of Whorwood was adjudged accordingly; and

it

it was alſo affirmed in the exchequer chamber upon a writ of error brought there; and he alſo cited a caſe 14. Iac. in B. R. Rot. 236. Demey againſt Ridg, where was a Bill of indictment for the ſtealing of a horſe, and the Bill was not found, and yet adjudged that an action upon the caſe will lye for that: Richardſon ſaid, that the indictment is not found here, and therefore it was no ſlander, and ſo was adjudged in a caſe in the 44. of Eliz. in the *Kings* Bench which was one Jeroms caſe, Juſtice Hutton ſaid that it ſeemed to him that the action doth not lye, for for it is not averred that there was any felony committed. alſo Iuſtice Hutton held that in this caſe the declaration is not good, becauſe it is not expreſly alleadged with an eo quod, that the Plaintiff ſtole the Vetches; but only an indictment preferred containing ſuch a matter, and Iuſtice Winch ſaid, that the framing of an indictment in a Court of record, is not any cauſe of an action, for it is a proceeding in an ordinary Courſe of juſtice; and for that reaſon ought not to be puniſhed by an action upon the caſe, for that will deterre and ſcare men from the juſt proſecutions in the ordinary way of juſtice: Hobert chief Iuſtice was of a contrary opinion: and yet he ſaid that it is true that the ordinary Courſe of juſtice, ought not by any means to be ſtopped or hindred, and as that may not be obſtructed, ſo neither may the good name of a man in any thing which concerns his life be taken away, and impeached without good cauſe, for Courts of juſtice were not erected to be ſtages, to take away the good name or fame of any man: and therefore by the common law, if two do maliciouſly conſpire to indict a man without cauſe, though the indictment it ſelf be good, and legally drawn, yet a writ of conſpiracy lies againſt thoſe which cauſed this indictment to be preferred; and it is as great a ſlander to preferre a Bill of indictment to the grand jury, and to give this in evidence to them, as it is to declare that in an ale houſe; and as to the declaration he held that to be good without any averment of an indictment indeed; and the indicement in writing, and the preferring that to the grand jury containes the ſcandal: and I am of opinion that an action upon the caſe lyes well: ſee more after.

Hill. 20. Jac. C. P.

Hill againſt *Waldron.*

Eaſter 20. *Jac. C. P.*

2. Dan. 99. pl. 1. Hutt. 48. S. C.

HIll againſt Waldron in an action of debt upon an obligation, the condition was that I. S. ſhall levy a fine to the obligee before ſuch a day of ſuch land, the Defendant pleaded that the obligee had not ſued forth any writ of covenant, the replication was that before the obligation made I. S. had made a feoſment in fee of the ſame land to I. S. and that the feoffee continued in poſſeſſion at the time of the making of the obligation: and upon this the Defendant demurred: and in this caſe two points were moved; firſt, when I am obliged that I. S. who is a ſtranger, ſhall levy a fine to the obligee, whether in this caſe the obligee is bound to ſue a writ of covenant, and it was argued by Serjeant Harvy that not, yet he agreed that if the condition was, that the obligor ſhall levy a fine to the obligee, in this caſe the obligee ought to do the firſt act, viz. to ſue a writ of covenant, as Palmers caſe Cooke 5. but otherwiſe when the fine is levied by a third perſon, for there the obligor had took all upon him 4. H. 7. 15. E. 4. if I am bound to marry the daughter of I. S. and ſhe will not marry me, yet I have forfeited my obligation, and ſo here he ought to leavy a fine at his perill, and at his own coſts, or at the coſts of the obligor. But admitting that the obligee ought to ſue a writ of covenant, becauſe it appears by the replication that before the obligation made, I. S. had made a feoſment over, and that the feoffee did continue poſſeſſion at the time when the fine was to be leavied; and therefore the obligee needs not to ſue forth any writ of covenant, becauſe he who is to leavy the fine had diſabled himſelf to perform that; and he urged Sir Anthony Maines caſe where Cooke 5. the party needs not to tender a Surrender becauſe that he who had the reverſion had granted that over before the Surrender was to be made.

Serjeant

Easter 20. Jac. C. P.

Serjeant Hendon to the contrary, for he argued that the obligation is not forfeit, except the obligee sue a writ of covenant, and there is no difference between this case, and when the obligor himself was to leavy a fine, for the obligor had not undertaken for the whole fine, but only that I. S. shall acknowledge a fine, and if the obligor shall be compelled at his perill to sue a writ of covenant, then you will construe the condition to extend to an unlawful act, for it shall be maintenance in him to sue forth a writ of covenant, & he vouched a case P. 4 Iac. Rot. 1548. Burnell against Bowle: the condition of the obligation was, that I. S. shall acknowledge a judgement in this Court to I. D. and in debt upon this obligation the Defendant pleaded that the Plaintiff had not sued forth any orginall writ, and it was holden a good plea: and for the second point he held that the obligee ought to sue this writ of Covenant, though that I. S. had dismissed himself of the land, for the words are general that I. S. shall leavy a fine, and this he ought to do, though no estate pass by the fine, for a fine upon release shall be a good performance of the Condition, but otherwise if it had been to make a feofment in fee, for a man cannot make a feofment except he be seised of the land at the time, as 31. E. 3. debt 164. a man was obliged to present the obligee to such a Church, and the obligee took a wife by which he had disabled himself to be a person, yet the obligor ought to present him, for otherwise he shall forfeit his obligation, and so in this case Hobert and Hutton as to the first point held the barre to be good, and that the obligee ought to sue forth the writ of Covenant, for Hobert said he ought to do that, for it is no reason to compel the obligor who is a stranger to the estate which passeth by the fine to sue a writ of Covenant, , and for that reason, if I am bound to compel you to come upon such land to take a feofment, I am not bound that the other make a livery of seisin, but if the case was that I was obliged to you, that I. S. shall leavy a fine to I. N. in such case the fine ought to be leavied at my peril, though that I. N. will not sue a writ of Covenant; Hutton accoyding, but Winch doubted of the case, and as to the second point Hutton and Hobert agreed that the obligee as this case is needs not to sue a writ of Covenant, because that I. S. had made a feofment of the land before, and so had disabled himself at the time of the obligation, for now it is impossible to leavy a good fine, for if he should enter into the land and put out the feoffee, this were not good within the condition; and Hutton said, it ought to be agreed that if I. S. had made a feofment after the time of the making of the obligation, and so had disabled himself afterwards, and the obligor is bound that a fine shall be leavied, this is to be understood of a good and a lawful fine, and not a fine in name only; and he put the case; that I let for years, and after Covenant to make a feofment to I. S. this lease for years is a breach of the Condition, though at the time of the Covenant made the lease for years was made. Iustice Winch thought the contrary, for this disability is by the act of a stranger, and for that the obligor may not take any certain notice of that, and therefore if I am obliged to you, that I. S. shall enfeoffe you of his Mannor, and at the time I. S. had made a feoffement of two or three acres of the same Mannor, yet if he enfeoffe you of that which he was seised at the time of the obligation, this is a good performance of the Condition, though that 2. or 3. acres were disjoyned from that before, and so in this case the obligor being a stranger to the estate of I. S. if I. S. make such an estate as he had at the time of the obligation made, this is sufficient, upon which he concluded, that the Plaintiff shall not have judgement, but afterward judgement was commanded to be entered for the Plaintiff according to the opinion of Hobert and Hutton.

2. Dan. 99. pl. 1. S. C.

2. Dan. 88. pl. 3. S. P.

Hoels case. Post 54.

Hutt. 60. 1. Jon. 16.

HOels case upon a special verdict, was to this effect, a man was seised of 2. acres of land in fee, and had 2. sones, and he devised both the acres to his wife

wife for life, the remainder of one acre to his eldeſt ſon in fee, the remainder of the other acre to his youngeſt ſon in fee, upon this condition in manner and form following, if either of my ſonnes die before my debts and legacies are paid, or before either of my ſonnes enter into their part, that then the longeſt liver ſhall have both parts to him and to his heires in fee, and the deviſor died, and Hoel the Plantiff being the eldeſt ſonne in the life of his mother releaſed all his intereſt and his demand in this to his younger brother, and the doubt was, whether this condition was gone by this releaſe, and Attoe argued that it was gone, for Littleton ſaith, that every land may be charged one way, or other: ſee Anne Mayowes caſe, Releaſe, Coo. 1. Albaines caſe, power of revocation releaſed: ſee more of this afterwards. East. 2c. Jac. C. P.

Whitgift againſt Sir *Francis Barrington.*

1. Dan. 647. pl. 9. S. C.
Hutt. 50. S. C. 655. pl.
2. Ro. Rep. 392. S. C.
W. Ent. 979. S. C.

IN Replevin the Defendant avowed as Bailiff to Sir Francis Barrington, and that Whitgift the Plantiff held certaine land of Sir Francis Barrington, by eſcuage et quendam reditum, and that the ſaid Sir Francis was ſeiſed by the hands of Whitgift his very Tenant, and for homage he avowed; and upon this the Plantiff demurred; firſt, becauſe he had avowed for homage, and had not ſhewed how nor in what manner the homage is due, whether in reſpect that the tenancy come to him by diſcent, or by purchaſe, and for that this general allegation is naught, for by Hendon Serjeant all the preſidents in ſuch avowryes made mention of the title to the homage, as 4. E. 4. in avowry for homage, the tenure is ſhewed, and a diſcent alleadged, or a purchaſe of the land, and in no book or in any preſident that he ever yet ſaw, did he ſee ſuch a general allegation in avowry for homage, but he agreeth the book of the 44. E 3. 42. if the avowry is upon tenant by the curteſie, this general allegation is good, but otherwiſe of a tenant in fee ſimple; and for that he alledged the ſecond E. 3. avowry in a replevin, the Biſhop avowed for homage due by the Plantiff, and exception was taken, becauſe it was not ſhewed in whoſe time the death of the anceſtor was, whether in his own time, or the time of his predeceſſor, and ruled to be evill, for his avowry being his title he ought to ſhew that in certaine, and ſo in our caſe. Hobert this caſe doth not prove our caſe, for in our caſe prima facie it is certain to all intents and purpoſes, and I cannot ſee how an avowry may be better made; and Finch at the barre vouched a preſident in the book of entries title horſe de ſon fee: ſecondly, where ſuch an avowry as in our caſe is made, and then Hendon moved that the avowrie is not good, for he had ſhewed the tenure by homage, and by eſcuage, and rent de quo quidem reddita, he was ſeiſed &c. and this is alſo repugnant; for when he ſaid that he was ſeiſed of the rent by the hands of the Plantiff, this is a ſeiſin of the homage as Bevils caſe is, and then by his own ſhewing, becauſe the ſeiſin of the rent is a ſeiſin of the homage, he ſhall not have the homage of the Plantiff. 1. Dan. 648. pl. 3. S. P.

Thirdly, admitting this point againſt him, and that the ſeiſin of the rent is not ſeiſin of the homage, yet the pleading is not good, for when he expreſſly alleadged ſeiſin of the rent in this manner de quo quidem reddita he was ſeiſed, this excluded the ſeiſin of any other ſervices, but only of the rent which is expreſſly alleadged: and therefore in our caſe he ought to have alleadged generally de quibus ſerviciis he was ſeiſed, and to leave this to the conſtruction of the Law; and he vouched 13. H. 7. 31. Serjeant Harvy to the ſame intent, for though perchance no good reaſon may be given wherefore the pleading ſhall be ſuch, and that the ſeiſin of the homage ought to be expreſſed, yet becauſe all the preſidents are ſo, the courſe of pleading ſhall not be altered: and all the preſidents ſhew a ſeiſin of the homage; ſee the book of entries 597. and 598.

Serjeant Fowſe to the contrary, the book of the 19. E. 2. Recovery 224. is, that the alleadging of the ſeiſin of eſcuage, as in our caſe of rent, is a ſufficient avowry

Trin. 20. *Jac.* C. P.

avowry for homage; and 29. H. 3. ſuch an allegation of the ſeiſin of rent was made in avowry for fealty, and good. Hutton, if the book of the 19. E. 12. be as Towſe had alleadged, it is all one with our caſe, Hobert ſeems the avowry is good, notwithſtanding this laſt exception, for perchance he was not actually ſeiſed of the homage by the hands of the Tenant himſelf, and then by his own, ſhewing his avowry ſhall abate, and he demanded of Brownlow, if there were any ſuch preſident of an avowry, who anſwered no. Hobert, if the continual pleading be as my brother Harvy had alleadged, we will not alter the courſe of pleading, but in my opinion, in reaſon none may plead in better manner or form, and Hutton being only preſent agreed, and then Hobert commanded the preſidents to be ſearched concerning that matter, and Finch at the barre being of Counſel with the avowant ſaid, that till the reſolution in Bevils caſe, it was a great queſtion whether the ſeiſin of the rent was the ſeiſin of the homage, and therefore perchance it will be hard to finde my antient preſident: they adjourned, and at another day Hutton and Winch being only preſent, judgement was given for the avowant againſt Whitgift, and Hutton ſaid, that he had ſpoke with the other Iuſtices, and they agreed.

2. *Dan.* 504. *pl.* 10.

Upon a motion made by Towſe, the caſe was this, a man made a leaſe for one year, and ſo from year to year during the will of the leſſor, and leſſee, rendring rent, and the leſſee died, and the rent was behinde, and by Winch being only preſent, if the rent is behinde in the time of the leſſee and he dies, an action of debt is maintainable againſt his Executor in the detinet only; and ſo I conceive, if that was behinde after his death, he may have an action in the debt and the detinet, or in the detinet only; to which Brownlow agreed; Secondly Winch ſaid, that when a man made a leaſe for a year, and ſo from year to year at the pleaſure of the parties, that this is a leaſe for 3. years, and not for two. Thirdly, he doubted if the leſſee hold over his term ſo that he is tenant at ſufferance, what remedy the leſſor had for his rent.

Upon the reading of a record the caſe was, that a Scire facias iſſued againſt the land, Tenant to have execution of a judgement given againſt Ferdinando Earl of Darby in the 15. Eliz. and the Defendant pleaded, that a long time before the ſaid Ferdinando any thing had in the land, one Edward Earl of Darby was ſeiſed of the land, and being ſo ſeiſed 3. Mar. infeoffed I. S. to the uſe of the Lord Strange and his wife in tail, the remainder over to the ſaid Ferdinando, and made the ſaid Ferdinando heire to the eſtate taile, and pretended that by this means the land ſhould not be liable to this judgement, becauſe it was intailed to Ferdinando; and of ſuch eſtate he died ſeiſed; the Plantiff traverſed the feofment made by Edw. Earl of Darby, and the jury found that the feofment was made by Edward Earl of Darby to the ſame perſons as the Defendant had pleaded, but this was to the uſe of the feoffor for life, the remainder over to the Lord Strange and his wife, the remainder as before; and whether this ſhall be intended the ſame Feofment which the Defendant had pleaded was the queſtion, becauſe the eſtate for life was omitted; and upon the ſpecial verdict that was the queſtion, and Attoe ſaid, that if the jury had found this feofment made to other feoffees, though the eſtate had agreed this ſhould be found againſt the Defendant; and Winch Iuſtice ſaid, that there was ſuch eſtate found as had taken away the execution or extent, and the eſtate for life is not material; but it was adjourned till another day.

A man Covenanted to make ſuch aſſurance as ſhall be deviſed by the counſel of the Plantiff, ſo the ſame aſſurance be made within the county of Norff. or the Citty of Norwich, and the Plantiff aſſigned the breach, and ſhewed that in this caſe his Councel deviſed, that a fine ſhould be leavied of the ſame land which was not done; and it was moved by Serjeant Attoe, that in this caſe the breach was not well laid,

laid, because he had not shewed where his councel devised that the fine should be leavied. Trin. 20. Jac. C. P.

In the case of a prohibition, in case of a libel in the Ecclesiastical Court for the tithes of Cattles, the Plaintiff alleadged that those Cattle, of which Tithes were demanded, are for his Dairy, and for the plough; and Winch being only present said, that the parson shall not have Tithes of such Cattle, but if he bred up Cattle to sell, it is otherwise; secondly, the Plaintiff in the prohibition alleadged that time beyond memory the parishoners had paid a half penny for the Tithe of a Calf, and a penny for a Cow; and that upon a day limitted they use to bring this to the Church, and to pay this to the Vicar, and now the Vicar had libelled in the spiritual Court, against them to compel them to bring it home to his house; and Winch said that this is no occasion of a prohibition, for they agree in the modus, but vary in the place of payment, and this is not matter of substance, and for that reason no prohibition will lie. 2. Dan. 599. pl. 4.

Upon the reading of a record the case was, that the father made a feofment to the use of himself for life, the remainder to his son and his wife, and to the heires of the body of the son, and this was for a joynture for his wife, and the father died, and the son also died, and whether this was a good joynture was the question, for all this matter was pleaded in barre of dower brought by the wife, and it was ruled to be no good joynture for the feme, notwithstanding that the father died in the life of his son, and Hutton said, if a man made a feofment to the use of himself for life, the remainder to his Executors for years, the remainder to his wife for a joynture, this will be no good joynture within the Statute of joyntures, though the feme here had the immediate franktenement. 2. Dan. 575. pl. 3.

In an action of debt, against an Administrator who pleads outlawry in the Testator; and it was moved that this was no plea, for he had taken the Administration upon him. Winch, a man who is outlawed may not make an executor, for if he meet with his goods, he shall answer for them to the King; and for that reason it seems to be a good plea, 3. H. 6. 32. and Brownlow chief Prothonotary, said that he could shew a president 27. Eliz. where this is adjudged to be no plea, and Justice Winch said to him, shew that president if any such be; and upon Tuesday after he shewed that, and then Winch agreed.

Auditor Curle for words. Post, 39.

AUditor Curle brought an action upon the case, and in his declaration he set forth the Statute of 32. H. 8. for the erection of the Court of Wards, and that the same Statute appointed the Auditor of the same Court, and shewed that the Plaintiff was an Auditor of the same Court: and that the Defendant such a day, and at such a place, said of him you have taken money for ingrossing of feodaries innuendo accompts, and tunc et ibidem you are a Cozner and live by Cozning, and I will prove that to be Cozenage; and upon not guilty pleaded, it was found for the Plaintiff, and now it was moved in arrest of judgement by Finch Serjeant of the King, that the Plaintiff shall not have judgement upon this verdict, for the first words are not actionable, for the taking of money for the ingrossing of feodaries are insensible, and then the inuendo will not help nor aid that, also the words in the second place are not actionable, because he had not said that he was a Cozning officer, and so he had not expressly applied that to his office, and the words are found generally, but yet admitting that the last words are actionable, yet the Plaintiff shall not have judgement, for the damages are intirely given, and for that reason void; see more and Bedles case cited in Osborns case, Cook 10. Hutt. 51. W. Ent. 70.

Trin. 20. *Jac.* C. P.

Harris Serjeant to the contrary, for an Auditor is an officer of truſt, and he took an oath when he entered into his office, and his receiving fees which are not due, are alſo extortion; and the words of Couſenage ſhall have alſo relation to the office, as in Barkleys caſe, you are a corrupt man, an action lies, and Haywel and Stakleys caſe, of a Iuſtice of the peace, and Sir Miles Fleetwoods caſe, he being receiver of the Court of wards, one called him Mr. deceiver and ruled, action lies, and tunc et ibidem ſhall have relation to the ſame time, in which the ſaid words were ſpoken; and ſo he prayed judgement for the Plantiff: and it was adjourned till another time. See after.

Good againſt *Bawtry.*

GOod brought an Ejectione firme againſt Bawtry, for ejecting him of certain lands in Creeting St. Maries, in Creeting St. Olaves, and in Creeting omnium ſanctorum, and a Venire facias iſſued, to try the iſſue, to Summon 12. men de vicineto de Creeting St. Mary, Creeting St. Olaves, and Creeting omnium omitting Sanctorum; and it was now moved in arreſt of judgement, by Attoe Serjeant, that the Venire facias was not good, for it ought to be of all the Creetings, and the Court blamed the Clark very much for his negligence, but it was adjourned till another time.

A man lett an advowſon for 40. years, and the leſſee covenanted that he would not alien without the aſſent of the leſſor, and he ſhewed all the matter, becauſe he had alienet to I. *S.* without his aſſent, and the Defendant pleaded, that he had not alienet without his aſſent, and upon that they were at iſſue, and it was found for the Plantiff, and now it was moved in arreſt of judgement, becauſe he had not laid, that the alienation was by deed, for an advowſon may not paſs without deed, and Hobert ſaid, if a man will declare in an ejectione firme of a leaſe made by the husband and the wife without deed, this is not the leaſe of the wife without deed, or yet if the Defendant will plead, not guilty, or non dimiſit, and this is found for the Plantiff, the Plantiff ſhall have judgement, for this ſhall be intended to be by deed, which was granted by Winch Iuſtice being only preſent, that the breach was well laid, and he alleadged a preſident 43. Eliz. a man abowed, and had not ſhewed that this was by deed; and the Defendant pleaded non conceſſit, and found for the abowant, and he had judgement, but Hobert denyed this caſe, but afterwards in the principal caſe, it was adjudged that the breach was well laid, and the Plantiff had judgement.

In a formedon in reverter the Tenant was eſſoyned, and the vouchee alſo appeared, the caſe was eſſoyned, and he had day over till octabis Michaelis. And then the Attorney of the Defendant would have been eſſoyned, and it was argued by Hendon Serjeant, that he ſhall not be eſſoyned, and yet he agreed if the vouchee had not appeared, the Tenant might have been eſſoyned againe, 13. E. 3 eſſoyne the 8. and the ſame Law of the vouchee be returned tarde, but if the vouchee appeare, and is eſſoyned, there the Tenant ſhall not be eſſoyned againe, and ſo is the expreſs book of the 3. H. 7. 17. 9. E. 3. 39. and the reaſon is, becauſe by the appearance of the vouchee the Tenant is out of the Court &c. and it was adjourned till another day: and at that day it was reſolved by the Court, that the Attorney ſhall be eſſoyned, and this was upon the view of a like judgement, in the caſe of the Earl of Clanrickard; and Hobert ſaid, that in that caſe the Roll of the 3. H. 7. was ſearched for, and could not be found; and Towſe urged 22. H. 6. and 13. E. 3. eſſoyne 8.

Sir

Sir *Henry L. Warden* of the *Fleet*.

Trin. 20. *Jac. C. P.*

RIchardſon Serjeant moued for the warden of the Fleet Sir Henry L. and his motion was that whereas one I. S. was in execution, in the Cuſtody of the Warden of the Fleet, for 300. l. and he made an eſcape, and he at whoſe ſuite he was in execution, brought an action upon this eſcape againſt the Warden of the Fleet, and he ſhewed that the Warden upon freſh ſuit had taken him again, and he prayed that the Plantiff may not proceed in his action, for though the Warden of the Fleet may plead this, though the action was brought before the retaking of the party, yet he prayed for the ſaving of charges, that the action may be ſtayed, and he ſaid, that there was ſuch a caſe in this Court, againſt Harris deputy Warden to Sir Henry. L. upon ſuch an eſcape, and he pleaded to the iſſue; and after he retook the priſoner: and in this caſe the Court had alſo relieved Harris if the iſſue had not been joyned, but Hobert, let the Plantiff be brought here preſent in Court, and then we will ſpeak to that point.

Gell againſt *White*.

GEll againſt White and others, and he declared in action of Treſpaſs, but the writ was general, but the declaration was quare vi et armis bona et catalla ſua ceperunt, et aſportaverunt viz. tertiam partem unius diſhei plumbei, Anglice, the third part of a diſh of lead Ore: and it was moved that the Plantiff ſhall not have judgement for the variance between the writ, and the declaration; and though it is objected, that here is not any original writ at all, for in verity there was not any, yet the declaration is contrary to it ſelf; for if in a replevin the Plantiffs writ is, de bonis et Catallis; and his declaration is of a taking of a horſe, this is not good, and ſo here boma viz. tertiam partem &c. for this particular thing may not be ſaid to be goods and Chattels: and Harris Serjeant moved, that the Attorney might be baniſhed the Court, for declaring without a writ according to the expreſs book, 20. H. 6, Hobert, good reaſon; adjourned till another time.

Anne Buckley againſt *Simonds*

Mich. 18. *Jac.* Rot. 2120. *Poſt*, 59.

ENtered Mich. 18. Jac. Rot. 2120. Anne Buckley was Plantiff in a Quare Imp. againſt Simonds, and the caſe in effect was, that Andrew Buckley, Grandfather of the husband of the Plantiff, did Covenant by indenture with Preſton, that before ſuch a day his Son ſhould marry the daughter of Preſton. And Covenanted to convey 6. l. 13. s. per Annum of rent iſſuing out of land, to hold to them during the life of the Covenantee and his wife, and after this he Covenanted for him, his heires, and aſſignes, that after the death of the Covenantor, and his wife the land to which the advowſon in queſtion is appendant ſhall remain, come, and be unto the ſaid ſon and his wife, and upon a demurrer the queſtion was, whether this Covenant did raiſe a preſent uſe to the Son, and to his wife, or whether this only reſts in Covenant, and Harris Serjeant argued, that no preſent uſe will ariſe by this Covenant, for firſt, all other Covenants in the indenture are in the future, for the words are, that the lands ſhall remain and come &c. and therefore till the death of the Covenantor the fee ſimple is in him, and no uſe will ariſe, for it ſhall be in the election of the Covenantor, what eſtate he will make to his Son, for he himſelf ſhall interpret his intent, and the difference in our

Trin. 20. *Jac.* C. P.

books is, when the words are in the preſent tenſe, and when in the future, and for this he cited 22. H. 7. by Iuſtice Rede, if a man Covenant that land ſhall diſcend, remain, or revert, he ſaid this did not give any preſent intereſt, becauſe the words are in the future, and it is in the election of the Covenantor, how, and in what manner the land ſhall paſs; and there he put the caſe, that if I give my horſe, or my Cow to I. S. there the Donee had election to take at his pleaſure the one or the other, becauſe the words are in the preſent tenſe, but if the words are, that I will give a horſe, or a Cow, there the Donor had election which he ſhall have, becauſe the words are in the future: the Lord Borroughs Covenanted 34. H. 8. Dyer 55. with another in frank marriage with his ſon, that immediately after his death, his ſon ſhall enjoy the uſe of his land of inheritance, according to the courſe as then they ſtood; and the queſtion was, whether the fee ſimple was preſently out of the Covenantor; and the opinion was that it was not, becauſe it was but a Covenant, and did not change the fee ſimple, and ſo is Dyer 96. Sir Thomas Seymor promiſed, and Covenanted by indenture in conſideration, that the Covenantee had granted land to him, that he would leavy a fine to Wimbiſh and Pennoy of other lands, which fine ſhould be to Sir Thomas Seymor for life, the remainder to the Covenantee in taile, and no fine was levied, and the queſtion was, whether any uſe was raiſed by this Covenant to the Covenantee, and the opinion of the book is, that not, becauſe it is in the future, and he cited the 20. H. 7. 10. the Duke of Buckingham in conſideration, that the Lord Henry his brother was to marry the Lady Wiltſhire, he Covenanted with Bray, and with others, that the Mannors of D. and of S. ſhall be to the Lady and to her heirs of her body begotten by the ſaid Lord, and after the Duke granted to the Lord Henry and his wife for their lives: and it was argued whether this ſecond grant is good or no, for if it is, then the firſt Covenant will not work to raiſe an uſe to the feme, and the book left that as a quere; and if it be, then he argued that in the principal caſe no preſent uſe is raiſed, but that this reſts meerly in Covenant, and ſo he prayed judgement for the Plaintiff.

Serjeant Hendon to the contrary, for he thought this will raiſe a preſent uſe, and that this was the intent of the parties, that this ſhould raiſe a preſent uſe, for the intent was to advance them firſt, during their lives with the rent, and after the death of the Covenantor and his wife with the land it ſelf, and therefore of neceſſity this will raiſe a preſent uſe, for a bare action of Covenant may not be any advancement at all; and the rather here, becauſe they who take benefit of this are ſtrangers to the Covenant, and not Preſton himſelf, for as it appears by 3. H. 7. a ſtranger ſhall not take benefit by a Covenant; and therefore he ſaid the intentions of the parties was to raiſe an uſe, for otherwiſe there ſhall be no advancement at all.

And further the words in the indenture are Covenant and grant, and if no uſe is raiſed, then this word grant is idle, and every word ſhall be ſo expounded that they may take effect, and the word Covenant is inſufficient of it ſelf to paſs an eſtate in land, or to have any eſtate in ſignification other then to a meer Covenant, and to be obligatory: as is put Co. 2. Cromwels caſe, Tirrels caſe, there vouched, a leaſe for years provided, and it is Covenanted, and agreed, there the Covenant is a condition, and alſo a Covenant, and 8. Aſſ. 1. 12. it is agreed, that if I Covenant that an other ſhall have my land for 7. years, this a good leaſe of the land it ſelf, and it was adjudged here Tr. 2. Jac. Rot. 1696. accordingly; and in our caſe this word Covenant and grant, is alſo ſufficient to raiſe an uſe, and to give an intereſt in the land it ſelf: and yet he agreed that if there was an other act to be made by the Covenantor or the Covenantee, that then no uſe will ariſe, but it ſhall reſt only in Covenant, Dyer 162. there are Covenants between the Lady Vere and Sir Anthony Wingfield her ſon, that the ſaid Lady would convey to her ſon by a recovery; and that after 6. moneths the ſaid Sir Anthony ſhall make an eſtate to his Mother for life, and there it is doubted whether the uſe is changed within

within the 6. moneths, and it was holden that it was not, for then it is impoſſible that the Covenants ſhould be perfoꝛmed, and in that caſe it is in the power of the Covenantoꝛ, to make an act that the Covenants ſhall not be perfoꝛmed, and therefoꝛe Covenants will not raiſe an uſe; but in our caſe no act of the Covenantoꝛ may hinder that this uſe ſhall ariſe, and therefoꝛe good, and foꝛ that the difference is, Dyer 296. which is entered 11. Eliz. the Roll of which I have ſeen, the father upon the marriage of his ſon, promiſed to the friends of his wife, that after his death his ſon ſhall have his land, to him and his heirs, and the book is ruled that this did not change the uſe, and the reaſon was, this Covenant was by words, and not in writing, but it was not doubted, if this Covenant had been by writing, but that the Covenant will raiſe an uſe, which is all one with our caſe, and ſo was Callard and Callards caſe 37. Eliz. ſtand foꝛth Euſtace, reſerving to my wife and my ſelf, I give to thee and thy heires, and there it was doubted, whether any uſe will ariſe to the ſon, and ruled that not, becauſe this was by woꝛds only, but it was alſo agreed, that if theſe woꝛds had been by writing, they had been ſufficient to raiſe an uſe to the ſon, and he cited Dyer 232. befoꝛe the Statute of the 27. H. 8. A Covenanted and agreed with B. that upon the marriage of his ſon, with the daughter of the other, that he would retain his land foꝛ life, and that after his death it ſhall remain to his ſon and his wife in fee, and the book is that this Covenant will raiſe an uſe, alſo if this Covenant and agreement will not amount to raiſe an uſe, then it is not to any uſe oꝛ purpoſe at all, and by conſequence the conſideration of the marriage is void alſo, and an action of Covenant will very well lye, without any ſuch conſideration of marriage; and ſo he concluded, and prayed judgement foꝛ the Defendant, adjourned.

Mich. 20. Jac. C. P.

Moor, 687. Cro. Eliz. 344. Poph. 47.

Johnſon againſt *Norway*.

IOhnſon brought an action of Treſpaſs againſt Norway of Treſpaſs made in a piece of gꝛound, and the Defendant pleaded, that 14. H. 7. Roger Le Strange and Anne his wife, were ſeiſed of the Mannoꝛ of D. and one Giles Sherington Abbot of C. was ſeiſed of an acre of land in fee, and held this of the ſaid Roger Le-Strange as of the Mannor of D aforeſaid, and that the 22. H. 7. the Abbot, and all the Monks died, by which the ſaid land eſcheated to Roger &c. and the Mannoꝛ diſcended to his ſon and heire after his death; who conveyed the Mannoꝛ of which the acre is parcel after the eſcheat by mean conveyance to Hobert in fee, and that Hobert 12. Eliz. infeoffed one Wright of the Mannor, of which the ſaid acre is parcel, and ſo juſtified by a conveyance from Wright to the Defendant: the Plaintiff replied by proteſtation that the Abbot was not eligible, and foꝛ plea he ſaid, that the aforeſaid Hobert 10. Eliz. infeoffed I. S. of the ſaid acre of land abſque hoc that he infeoffed Wright of the ſaid Mannoꝛ of which the ſaid acre is parcel; and upon this the Defendant demurred generally. And Serjeant Attoe argued foꝛ the Plaintiff, that the Plea of the Defendant is evil, and then though the replication of the Plaintiff is not good, yet the Plaintiff ſhall have judgement, and he cited Turners caſe; Hobert it is true, if the replication be meerly void, then it is as you had ſaid, but if the replication be the title of the Plaintiff, and that be inſufficient, there the Plaintiff ſhall not have judgement, though the plea in barre was evil. Attoe agreed, that if it appear by the Plaintiffs own ſhewing, that he had no cauſe of action, and that he had no title, he ſhall not have judgement, but here he had made a good title by the leaſe of the ſaid acre of land, and though our traverſe is evil, and ſounds in doubleneſs, yet the Defendant had demurred generally, and ſo he had loſt the advantage of the doubleneſs, oꝛ of the negative pregnant, foꝛ if a man plead double matter, this is only matter of foꝛm, and not of ſubſtance, and therefoꝛe after verdict it is good as hath been adjudged: but he proceeded in his argument, and he ſaid that the barre of the Defendant is

Cook 8.

not

Mich. 20. *Jac. C. P.*

not good, for by his own ſhewing this acre of land is not parcel of the Mannor, for by the diſſolution of the Monaſtery by the death of all the Monks, the land ſhall go to the founders and donors, and not to eſcheat to the Lord of which that is holden, as appears 2. H. 6. 7. and 5. H. 7. If an annuity or rent be granted to an Abbot in fee, and the Abbot and all his Monks do die, the annuity or the rent is extinct, and ſhall not eſcheat: ſee the Deane of Norwiches caſe Coo. 3. agreed, that by the death of the Abbot and his Covent the corporation is diſſolved, and then the poſſeſſion ſhall go to the founders, and ſhall not eſcheat to the Lord of the Mannor of which the Land was holden, and he ſaid that this point is proved clearly by the Statute, of the 27. H. 8. and 31. H. 8. of Monaſteries, in which Statutes there is an expreſs ſaving to all perſons, except to the donors and to their heires; and no mention is made of the ſaving of the right of thoſe of whom the land was holden; and that proves clearly, that if the makers of the Statute had thought that the land had eſcheated to the Lords, they would have excepted them in the ſaving of the act, as they had excepted the Donors and Founders, for if otherwiſe the lands, and poſſeſſions ſhall eſcheat to the Lords of which the land was holden, they are within the ſaving of the Statute: and then it will follow that after the death of all the Monks, as at this day, that the Lords ſhall have the land by eſcheat, which the Sages of the Law never dreamt of who made that Statute, that any thing may accrew to the Lord, and therefore they provided only for the title of the Donors and Founders, which is an argument that they thought, that upon the diſſolution of the Monaſteries, that the lands ſhall go to the Founders, and the ſame he thought concerning a corporation at this day, as of Suttons Hoſpital &c. and ſo he concluded that, becauſe in the barre of the Defendant he claimed to hold from the Lord, to whom he ſuppoſed the land to eſcheat, and did not claim &c. by his own ſhewing the barre is not good: and though our replication, and traverſe is not good, yet the Plaintiff ſhall have judgement.

But admitting that the barre is good, yet the replication and traverſe is good, and then judgement ſhall be given for the Plaintiff: and the caſe is, the Defendant pleaded a feoſment of the Man. 12. Eliz. to Wright after that he had ſhewed the eſcheat of an acre, the Plaintiff replied that the 10th. Eliz. the Feofor infeoffed C. of the acre of land, abſque hoc that he was infeoffed of the Mannor of which the acre is parcel, and Attoe argued, that the traverſe is good, and he alleadged 38. H. 6, 49. the ſame traverſe, and here when the Defendant had pleaded that the acre eſcheated, and had alleadged a Feoſment of the Mannor, and had not expreſly alleadged a Feoſment of the acre, the Plaintiff may traverſe that which is not expreſly alleadged, becauſe this deſtroyes the very title of the Defendant; and he cited for that 34. H. 6. 15. a writ of priviledge in treſpaſs, as a Servant to an auditor of the exchequer, the Plaintiff replied that he was ſervant to him in husbandry, abſque hoc that he was his ſervant to waite and attend upon him in his office, and it was holden a good traverſe, and yet that was not expreſly alleadged by the Defendant.

Hobert chief Iuſtice ſaid, that the traverſe is not good, for by the Feoſment which was made the 12th. Eliz. he had confeſſed and avoyded the Feoſment which was made 10th. Eliz. and ſo there needed no traverſe, and therefore he ſaid, the great doubt of the caſe will be upon the barre of the Defendant, whether by the death of the Abbot and the Monks, the land eſcheat to the Lords of whom that was holden, or whether that ſhall go to the Donors, and to the Founders, and he thought that the land ſhall eſcheat, to which Winch ſeemed to agree; and Hobert ſaid, that the writ of contra formam donationis was given to the Founder or Donor by the Statute, and not by the Common Law; but in the principal caſe, the judges ſaid they would adviſe of that, and gave day over to argue that again.

Auditor

Mich. 28. *Jac.* C. B.

Auditor Curles caſe before. 33.

AND now at this day the caſe of Auditor Curle was moved again in arreſt of judgement, by Hendon, and he ſaid Auditor Curle brought an action upon the caſe againſt Tuck, and he ſhewed in his declaration the erection of the Court of Wards, by the Statute of 32. H. 8. and that it was ordained by the ſame Statute, that thoſe perſons which ſhall be ordained Auditors of the ſame Court, ſhall be ſworn and take an oath, and that ſuch a time the Plantiff was ſworn an Auditor, and that to the office was 2. s. due to be paid for the ingroſſing of Feodaries, and that the ſaid Plantiff exerciſed the ſaid office honeſtly, and juſtly, and with the fees and the profits of the ſame he maintained his family, and that the Defendant ſuch a day, and at ſuch a place having Communication with the Plantiff concerning his behaviour in his office, ſaid to him, you have received money for the engroſſing of Feodaries, and I will prove that to be Couſenage, and tunc et ibidem ſaid you are a Couzner, and live by Couzning; and Hendon after verdict, for the Plantiff moved in arreſt of judgement, firſt, he ſaid the office appertains to 2. Auditors, as appears by the Statute of 32. H. 8. and by Auditor Curles caſe, and if that appertain to 2. then this doth not appertain to the Plantiff alone, and ſecondly, the Plantiff had expreſly laid in his declaration what fees are due to the office for the engroſſing of Feodaries, and then when it appears by his own ſhewing that the fees were due, and that the Defendant ſaid of him, that he took money for the engroſſing of Feodaries, this may not be any ſcandall to him, and he cited Suaggs caſe, Coo. 4. where the Plantiff ſhewed that his wife was living, and that the Defendant ſaid of him, that he had killed his wife, here in this wiſe no action lies, for it appears by his own ſhewing, that the wife was alive, and ſo no ſcandal, and ſo in our caſe, when he had ſhewed that ſuch fees were due for the engroſſing of Feodaries, it was no ſcandal to him, for the Defendant to ſay, that he took money for the ingroſſing of them, and thereby the words are general of Couzenage, and they may have other interpretation as the Couzning at the Cock pits, or the like, and then thoſe general words ſhall not be applied to his office, and not left to ſuch an expoſition as is equivocal, and he vouched Serjeant Heales caſe, Mr. Heales Warrants have undone many a man, and adjudged that an action lies, becauſe it had relation to his profeſſion, but he ſaid that this was afterwards reverſed in the Exchequer chamber, becauſe the word Warrants is general, and may be applied to other things: but Winch interrupted him, and ſaid that it was not reverſed for error, then Hendon alleadged Yardleyes caſe 11. Jac. in C. B. where one ſaid to another, is Yardly your Atto ney, your Attorney is a bribing knave, and took 20. l. of you to Cozen me, and the opinion was, that an action will not lie, and Winch interrupted him again, and ſaid it was adjudged the contrary, and after Hendon alleadged Eliots caſe againſt Brown Hill. 17. Jac. B. R. thou haſt made falſe writings between I. S. and his brother, and adjudged that an action lies, and he cited Mallard againſt Wife for theſe words, 10. Jac. Mallard is a knave, and forged my husbands Will againſt his minde, and ruled that no action lies, and ſo 13. Jac. Harvey againſt Beking, and he applied all theſe caſes, that the words ought to ſcandalize him in his office and profeſſion, for if words by any intendment may have relation to any thing elſe, they ſhall not be interpreted to have relation to his office, and therefore here the words are too general, alſo he ſhewed that when the Plantiff had ſaid, that the Defendant ſuch a day having communication concerning him in his office, ſaid you have received money for the engroſſing of Feodaries which is Couzning, and tunc et ibidem ſaid you are a Couzner, and live by Couzning, theſe words tunc et ibidem ſhall not have relation to all: but only to the laſt words, and cited 5. H. 7. 8. to that purpoſe: and ſo he concluded againſt the Plantiff.

1. Brownl. 6. Hob. 8. Moor, 855.

Attoe

Mich. 20. Jac. C. B.

Attoe Serjeant to the ſame purpoſe, but his only argument was, becauſe the Plantiff had alleadged that the fees were due to him, and ſo no ſcandal according to Snags caſe.

But it was reſolved by Hobert and Winch being only preſent, for Hutton was in the Chancery, and Iones was not yet returned from Ireland; that the Plantiff ſhall have judgement, and firſt it was agreed by them and by Hutton the day before, that tunc et ibidem ſhall have relation to the ſame time that the firſt words were ſpoken, and ſecondly, by Hobert and Winch though the office appertaines to 2, yet this is a ſcandal to him, for the ſcandal is to the perſon, and not to the office, and the perſons are diſtinct and ſeveral, though the office is joynt, and they may not joyn in an action, for of the other no words are ſpoken, and ſo they agreed that this objection is of no force, and as to the other objection which was made by Hendon, and by Attoe, Hobert ſaid that true it is as had been cited, but he ſaid for his part he never was, nor yet is ſatisfied in the Law of that caſe, for be ſhe in life or not, yet the ſcandal is the ſame to the ſtanders by, who perchance did not know that ſhe was living, and ſo the ſcandal never the leſs: but admitting the caſe to be good Law, yet our caſe differs from the reaſon of that, for in our caſe he had ſhewed that 2. s. fees were due to him for the ingroſſing of Feodaries, and the Defendant ſaid, that he took money for the ingroſſing of Feodaries which is Couzning, and ſo ſhall be intended that he took more then was due, and this is extortion; and as to Elliots and Browns caſe he agreed, that to ſay he had made falſe writtings no action will lie, for it is no ſcandal to him in his profeſſion, for it doth not appertaine to an Attorney, to make writtings, no more then it appertaines to an Apothecary to give Phyſick, and ſo it is no ſcandal to him in his profeſſion: and he agreed the caſe of Mallard againſt Wiſe, he forged my husbands Will, no action will lie, for the words are repugnant and contrary, for if it be forged, it is not the Will of her husband, but in our caſe the words had a plaine ſence to common underſtanding, and ſhall be intended to refer to his office, for if he had ſaid that he took money for ingroſſing of Feodaries, which is deſceit without queſtion, that had been actionable, but there may not be Couzning without deſceit.

And he cited Boxes caſe, where one ſaid of an Attorney, that he was a maintainer of ſuits, and a Champerter, action lies, for it ſhall be taken to be a ſcandal to him in his profeſſion, for though an Attorney may maintain ſuites, yet he ought not to be a Champerter, and he further ſaid, that he who will maintain an action for words ought to be ſcandalized in his publick profeſſion, and he cited a caſe which was in the Kings Bench, Brad againſt Hay, and the Plantiff declared, that he was Bailiff to ſuch a one, and that he had the buying and the ſelling of his Corn, and that the Defendant ſaid of him, that he ſold by falſe meaſures, and adjudged that no action lies, for it is not a ſcandal to him in his publick profeſſion, and ſo 36. Eliz. one ſaid of a Merchant that he kept a falſe debt book, and becauſe he may be a Merchant without a debt book, it was ruled that an action doth not lie, but if he had ſaid of him that he deceived men by buying and ſelling, theſe words had been actionable, and he ſaid that two things are required to every publick profeſſion, ſcience, and fidelity, and when a man who hath a publick profeſſion is ſcandalized, in either of theſe an action of the caſe lies, and cited Palmers caſe of Lincolns Inne, he being a Lawyer 'twas ſaid to him by one, that he had as much Law as a Jackan-apes, and adjudged to be actionable, for it is a ſcandal to him in his profeſſion, and ſo Sir Miles Fleetwoods caſe, where he who is Plantiff in this action was Defendant in that, he being receiver of the Court of Wards, one ſaid to him, Mr. receiver hath Couzned the King, and hath dealt falſly with him, and adjudged that an action upon the caſe lies, and yet he did not ſhew, wherein he had Couzned him or dealt deceitfully with him, but yet becauſe it appears to the Court that he might deal deceitfully, and Couzen the King, therefore actionable, and he cited Birchleys caſe, you have dealt corruptly, an action lies, and yet he

Cro. Eliz. 342. Golds. 126. Ow. 17.

did

did not ſhew wherein he had dealt corruptly, and here he had ſaid he was a Couz ner by the receipt of money, which is an expreſs ſcandal to him in his office. Winch accordingly to every office of truſt is a condition in Law annexed, that he deal honeſtly and juſtly, and he cited Wingates caſe in the Kings Bench, one ſaid to another, is Wingate your Attorney, and the other ſaid that he was, and the other replied, take heed and follow him well, for elſe he will make you throw your purſe over your boſome; and it was adjudged that an action lies, for it is a ſcandal to him in his profeſſion, and it ſhall be taken as much as if he had ſaid, he will make you ſpend all the money in your purſe, if you look not the better to him, and ſo applied this to the principal caſe: and in this caſe judgement was commanded to be entered for the Plaintiff in the action, if no other cauſe be ſhewed before ſuch a day. Mich. 2 c. Jac. C. P. 1. Dan: 110. p. 1. 3. c.

An action upon the caſe was brought for theſe words, the Plaintiff did load a ſhip of my Fathers with Barley, and did ſteal, and Couzned 7. quarters thereof in meaſure, and upon not guilty pleaded it was found for the Plaintiff, and now it was moved in arreſt of judgement, that the word Cozned being joyned with the word ſtole, had taken away the force of that, and made it but Cozning, but Hutton contrary, and that it ſhall be underſtood, that he ſtole 7. quarters in meaſure, and quantity, and Winch ſeemed to agree, and it was adjourned: and an other day awarded that an action lies.

Godfrey Wade Alias Mack-Williams caſe.

GOdfrey Wade and others in an ejectione firme, and the caſe upon a ſpecial verdict was to this effect, Henry Mack-Williams the father was ſeiſed of land, and being ſo ſeiſed he conveyed that to the uſe of himſelf for life, the remainder to his wife for life, the remainder to the heires of their two bodies engendred, the remainder to the heires of the bodie of Mack-Williams the Feoffor, and the remainder to his right heirs in fee, and he had a ſon by his wife named Henry, and 5. daughters, and he died, and afterwards the ſon in the life of his Mother by deed indented, leaſed to White-Head for 31. years rendring rent, and afterwards he leavies a fine to the uſe of himſelf, and his heirs in fee, and died, and after whoſe death the Mother ſuffered a recovery within ſix moneths, in which 4. of their husbands were vouched, and the recovery was to the uſe of the feme for life, the remainder to every one of the daughters in fee, and the ſole doubt was, whether the leaſe made by Henry the ſon is defeated by this recovery, and it was argued by Harvey Serjeant, that the leaſe ſhall ſtand good, notwithſtanding this recovery ſuffered by the Mother, for he ſaid, that Henry Mark-Williams being iſſue in tail, and alſo being heire to the remainder in fee, who made this leaſe by indenture, in this caſe this leaſe iſſues as well out of the eſtate taile, as out of the reverſion in fee, and the fine leavied in the life of his Mother, binds and bars the eſtate taile at the time of the fine, and then the leaſe being drawn out of the reverſion in fee, which diſcended to the daughters after the death of their brother, this reverſion ſhall be charged with the leaſe, and the recovery had not deſtroyed that: and this caſe will differ from Capels caſe, for it is agreed, if tenant in tail bee, the remainder in fee, and he in remainder in fee granted a rent charge, and after Tenant in tail ſuffer a recovery, by this the rent is deſtroyed, for there he who ſuffered the recovery was Tenant in tail in poſſeſſion, but in our caſe when the ſon had leavied a fine in the life of his Mother, by this fine the tail is deſtroyed, and the Mother is become Tenant in tail after poſſibility of iſſue extinct, which is only an eſtate for life in quantity, and then though ſhe ſuffers a recovery, yet this doth not deſtroy the leaſe made by Tenant in tail, when there was alſo a fine leavied to confirm that. Secondly, he argued, that when the iſſue in tail in the life of his Mother made a leaſe Hob. 332.

Mich. 20. *Jac.* C. B.

for yeares by indenture, and then leavied a fine, and died, and then the Mother being Tenant in tail, and joyntreſs within the Statute of 11. H. 7. as in our caſe ſhe is, and ſhe ſuffers a recovery, and vouches the daughters in reverſion, and leſſee for years enters after the death of the feme, by force of 11. H. 7. for leſſee for years is a perſon who may enter within the expreſs words of that Statute, which gives entrie to any perſon who hath an intereſt, and ſee for that Coo. 3. Lincoln Colledge caſe, and Dyer 148. Thirdly, he held that though it ſhould be ſo, that leſſee for years may not enter by force of the Statute, of the 11. H. 7. yet he may falſifie a recovery by the Statute, of the 21. H 8. which enables leſſee for years to falſifie as well as leſſee for life, and it appears by the verdict, that the ſole intent of this recovery, was to defeat the leaſe for years, for this was ſuffered within 6. moneths after the death of Henry Mark-Williams the ſon, and alſo the recovery was to the very ſame uſes which they were before, and therefore the leſſee may falſifie the recovery, it is true in Capels caſe, the leſſee of him in remainder may not falſifie a recovery ſuffered by Tenant in tail, though it was ſuffered of purpoſe to defeat the leaſe for years, but in our caſe the leaſe for years doth not enure by vertue of the eſtate tail, for that is bound by the fine, but this iſſues out of the reverſion in fee, and for that reaſon the leſſee ſhall falſifie this recovery, in an ejectione firme, or in an avowry, and he cited Kings caſe, Hill 37. Eliz. B. R. Rot. 293. Tenant in tail infeoffed his ſon, and after he diſſeiſed him, and afterward leavied a fine of that with Proclamations, the ſon entered upon the Conuſee, and made a feoffment, and the Proclamations paſſed, and the feoffee of the ſonlet for years, and then the father and the ſon died, and the iſſue in tail brought a formedon, and recovered, and it was agreed, that leſſee for years may falſifie this recovery, and he ſaid that he had ſeen a Note in Iuſtice Manwoods Study, that it was agreed in his Circuit, that leſſee for years to begin at a day to come may falſifie a recovery, and ſo he concluded his argument.

10. Eliz. 589.
10. Ow. 75.

Hendon Serjeant to the contrary, and he divided the caſe in three points. Firſt, when Tenant in tail had iſſue a ſon, and a daughter or two ſons, and the eldeſt ſon in the life of his father, who is Tenant in tail levies a fine, and dies without iſſue, whether this ſhall binde the youngeſt ſon, and he thought that it ſhould not, and yet he agreed, that an eſtate tail may be barred by a fine, though he who leavied the fine was not ſeiſed at the time of the eſtate tail, and this by the very words of the Statute, of the 32. H. 8. ſee the caſe of fines Coo. 3, and Grants caſe vouched, Lampets caſe, and ſo is the caſe of Hunt and King 37. Eliz. cited by my brother Harvey, and ſo he agreed clearly, if the ſon who leavies the fine, ſurvives the father who was Tenant in tail, that then in this caſe this binds the eſtate tail for ever: and the reaſon is upon the very words of the Statute, of 32. H. 8. or any was intailed to the Anceſtor of the iſſue in tail, and in this caſe, when the iſſue doth ſurvive the Anceſtor, and dies, this ſhall binde the iſſue, becauſe it was intailed to him who leavied the fine who was his Anceſtor, for he may not make any Conveyance to the eſtate tail, except he make mention of him, who leavied the fine, becauſe that he ſurvived the father who was Tenant in tail, but when he who leavies the fine dies in the life of his father, viz. the eldeſt ſon, then the youngeſt ſon may convey an eſtate taile to him without making mention of his eldeſt brother: and this appears by the 46. E. 3. 9. 4. H. 6. 10. 11. H. 7. 6. ſee the caſe of Buckner Coo. 8. from which caſes he inferred, that if the youngeſt brother may have an action at the Common Law, without making mention of his eldeſt brother, then ſuch a conſtruction ſhall be made of this word Anceſtor, in the Statute of 32. H. 8. that it ſhall be taken for ſuch an Anceſtor, by whom the iſſue in tail claimes, and for no other Anceſtor, and for this he put the caſe, if land be given to a man and to his heirs, females begotten of his body, and he had iſſue a ſon, and a daughter, and the ſon leavied a fine, and died, this ſhall barre the eſtate tail for the cauſe aforeſaid, and for authorities in this kinde he cited the reports of Dalliſon of——— Eliz. printed at the end of Aſhles Tables in Stamfords

caſe

caſe in the end of the ſame caſe, where the very difference is agreed, where the eldeſt ſon dies in the life of the father, and where not: and Hobert demanded of him by what warrant thoſe reports of Dalliſon came in print. Mich. 29. *Jac. C. P.*

And then Hendon cited the opinion of ſome of the judges, in the caſe of Zouch and Banfield: and ſee Coo. 3. the caſe of fines according to this difference: and he ſaid, that Sir George Browns caſe will warrant that in the very letter of it, for there it is ſaid, that no iſſue inheritable by force of the tail may enter after the fine, by which he inferred, that if he is ſuch an iſſue that is not inheritable, he is out of the Statute, and ſo he concluded the firſt point, that the fine being leavied by the eldeſt ſon, in the life of his Mother, that ſhall not barre the eſtate tail. Secondly, he argued that as this caſe is, the feme is not within the Statute, of the 11 H. 7. becauſe that at the time when ſhe ſuffered a recovery, ſhe was ſeiſed of an eſtate, in general tail by force of the remainder which was limitted to her and her husband, and to the heirs of their two bodies ingendred, which took effect in the feme, at the time of the death of the husband; and this being an eſtate in tail of the purchaſe of the huband which took effect in remainder, this may not be a joynture within the Statute of of the 27. H. 8. and then if ſhe be not a joyntereſs within that Statute, though this eſtate was of the purchaſe, and of the acquiſition of her husband, yet this is out of the danger of the Statute, of the 11. H. 7. for the words are, any woman who had any eſtate in dower, or in tail joynt with her husband of the purchaſe, and of the acquiſition of the husband: which words of the purchaſe of the husband had relation to Tenant in dower, or to a woman who was a joyntreſs, and was not the intent of the Statute, to make ſuch a remainder to be within the danger of the Statute, when the husband himſelf in his life may dock this by a recovery, and therefore it is not within the Statute.

And as to the Third point he argued, that admitting that ſhe was a joyntreſs, within the Statute of the 27. H. 8. yet when the feme ſuffers a recovery with the aſſent of him in remainder in fee, this recovery is out of the body of the Statute, of 11. H. 7. any which ſhall diſcontinue, or releaſe with warranty, and that all ſuch recoverees ſhall be void, and ſhall be taken for fained recoveries, and this may not be imagined a fained recovery, where he in remainder in tail is vouched by him who is Tenant for life, Jennings caſe Coo. 10. and ſuch recovery, as is there reſolved, is out of the Statute of the 14. Eliz. and is good by the Common Law, and ſo in our caſe, but admitting this to be within the Statute of the 11. of H. 7. yet the proviſo of the ſame Statute had made that good, for there is an expreſs proviſo, that a recovery with the aſſent of the heir inheritable, if this appear upon Record this ſhall not be within the Statute, and in our caſe, this is with the aſſent of the heir inheritable, and alſo this appears to be of record, and ſo the recovery is out of the danger of the Statute, of the 11. H. 7. See Doctor and Student, a book which was written but a little time after the making of this Statute, and Dyer 89. Vernons caſe, and he ſaid that the intent of the ſame Statute, and of the proviſo of the ſame Statute was to have iſſues and heirs, and not termors, who had only a future intereſt to falſifie recoveries, and ſo he concluded that the recovery is out of the ſame Statute, and that the proviſo of the ſame Statute had made that good, by the aſſent of the heir, but admitting, this ſhould be againſt him, that this recovery ſhall be within the Statute, yet the leſſee in our caſe ſhall not falſifie, nor take advantage of the forfeiture by force of the ſame Statute, but it hath been objected by Harvy, that the wife in this caſe had only an eſtate for life, or Tenant in tail after poſſibility of iſſue extinct, and he anſwered that the reſolution in Beamounts caſe Coo. 119. is contrary, for it is there expreſly agreed, that ſhe was Tenant in tail after the fine leavied by the iſſue, and ſo was it alſo reſolved in Pophams caſe 9. Eliz. but there it was doubted whether ſhe was Tenant in tail, within the 32. H. 8. who might make a leaſe, but all agreed that ſhe was Tenant in tail, who may ſuffer a recovery, and binde the remainder: and then when the feme ſuffers ſuch a recovery as in our caſe, that recovery ſhall take away a term

Mich. 20. Jac. C. P.

for years which was made by the iſſue in tail, in the life of his mother, notwithſtanding ſhe was a joynteress within the 11. H. 7. alſo he ſaid, that this leaſe for years being made by Henry Mark-Williams, the ſon who was heir to the eſtate in tail, and alſo to the reverſion in fee, being made by deed indented rendring rent, this ſhall be a leaſe which iſſued out of the eſtate in fee ſimple, and not out of the eſtate tail, and this ſhall be out of the eſtate tail by eſtoppel, being by deed indented, for an eſtate ſhall not enure partly by way of intereſt, and this leaſe to begin after the death of the feme, he may not take advantage of the forfeiture, for though the words of the Statute are, that all ſuch recoveries ſhall be void, yet this ſhall not be void without entry, and he who will have benefit, by this ought to be inabled to enter preſently, ſo ſoon as the recovery is ſuffered, for as there ought to be a perſon, in eſſe, who ſhall take benefit of the ſame Statute, as appears by Coo. 3. Lincoln Colledge caſe, ſo there ought to be a preſent eſtate in eſſe at the time of the recovery, for the words of the Statute are to whom the intereſt ſhall appertain, but in our caſe the intereſt doth not appertain to the leſſee, who had only a future term, and therefore he ſhall not take the benefit by any forfeiture, within the Statute of 11. H. 7. and the rather in our caſe, becauſe there is a rent reſerved; alſo all this matter is found by ſpecial verdict what eſtate the ſon had when he made the leaſe by indenture, Dyer 244. Coo. 155. and Bredons caſe, in Treports caſe leſſee for life, and he in reverſion by indenture let for years, this is no eſtoppel, and it ſhall be ſaid to be the leaſe of one, and the confirmation of the other: and here the leaſe ſhall be ſaid to iſſue out of the reverſion in fee, and not out of the eſtate tail, and he vouched a caſe adjudged 10. Jac. when Flemming was chief Juſtice of the Kings Bench between Errington and Errington, and the caſe was, that a man conveyed land to the uſe of himſelf, and his wife in tail, the remainder to his right heirs, and had iſſue a ſon and a daughter, and he died, and the ſon let for years to begin after the death of his Mother, and he died without iſſue, and the daughter leavied a fine, and the wife who was Tenant in tail died, and the queſtion was, whether this leaſe for years iſſued out of the eſtate tail by way of eſtoppel, for then the Conuſee ſhall not avoid this, but it was adjudged this leaſe was drawn out of the reverſion in fee, and the Conuſee of the daughter ſhall avoid that, which is all one with our caſe; but admit that this leaſe is good by eſtoppel out of the eſtate taile, yet he ſhall not take benefit of the forfeiture, within 11. H. 7. and this differs from Sir George Browns caſe, for there the Conuſee entered by vertue of a remainder, and not by the eſtate tail which paſſed to him by eſtoppel: and upon that he concluded, that if this is an eſtate meerly by eſtoppel, he ſhall not have benefit by that.

2. Bulſt. 42.

Pope and *Reynolds* before.

2. Dan. 607. p. 2. 608. p. 6. 7.
Hutt: 57. S. C.

NOw the caſe between Pope and Reynolds (which ſee before) was moved again by Aſhley for the Plantiff in the prohibition, and the caſe was, that he was owner of a Park, and the Park had been time beyond memory, replenished with deer till the 10th. of Eliz. at which time that was diſparked, and that the owners had uſed before the diſparking to pay a Buck in Summer, and a Doe in winter, in full ſatisfaction of all Tithes due to the Vicar; and the Parſon had libelled in the Eccleſiaſtical Court for Tithes in kinde, and alſo traverſed the preſcription, and it was found for the Plantiff in the prohibition, and it had been moved in arreſt of judgement, that notwithſtanding this preſcription is found for the Plantiff, yet he ſhall not have judgement for two cauſes. Firſt, becauſe groſs Tithes belong to the Parſon; and not to the Vicar, for the Vicaridge is derived out of the Parſonage; to this he anſwered, that for the moſt part every Vicaridge is derived out of the Parſonage, but it is a meer non ſequitur that this doth, for the Vicarage, and the Parſonage may have ſeveral patrons, Fitzh 45. alſo a

2. Dan. 604. p. 3.

Vicarage

Vicarage may be time beyond memory, as in our case 40. E. 3. 2. 7. and Fitz. juris utrum. a Vicar may have a juris utrum. and also he said, that in some parts the Vicar shall have Tithe Corn, and hay, and not the Parson, and so he concluded this to be a good prescription by the Common Law; and then for the second point, he argued that though the Park is disparked, yet the modus decimandi continued, and he vouched Beddingfields, and Fields case P. 38. Eliz. B. R. prescribed to pay 10. s. for a Park, this modus had a continuance notwithstanding the disparking: and 18. Iac. upon a motion a prohibition was granted in such a case. Mich. 20. Jac. C. P.

Hendon to the contrary; and yet for the first point he agreed, that a prescription to pay Tithes to the Vicar was good, for here it appears, that the Vicarage is as antient as the Parsonage, both being time beyond memory; and it was the opinion of all this Court when the case was first opened, and so he said, he would not insist upon that, but agree the Law to be against him, but then for the second point, he held the modus to be gone by the disparking, for the prescription is annexed to the Park, and not to the land, for the prescription is to pay a Buck and a Doe for all manner of Tiths of that Park, and then the prescription is in some sort annexed to that meerly as land, but quatenus a Park, and for this he held, if a man will prescribe to pay 10. s. for the Tithes of such land, and it is given in evidence to be a Park, this will not maintain the issue, for a Park is deceivable one way or other, and so are of several natures, and so Coo. 4. Lutterels case, a tenure to cover the hall of the Lord, if the hall is thrown down the tenure is gone, and here when the Park is destroyed, the modus is also destroyed, but it hath been objected here, that the prescription is general, and therefore though the Park was disparked, yet the modus had continued, to this he answered, that this prescription shall have such construction as a grant shall have, and though it is general, yet it is sub modo subject to this limitation, that this always continue and remain a Park, and it was resolved 43. Eliz. that the Commoner may not grant over his Common, except he grant over his Tenement, for they may not be severed, and so indeed is Nevils case in the Commentaries: a man prescribed to have estovers to burn in his house, if the owner destroy the house the estovers are gone, for the prescription is annexed to the house, and so in our case the prescription is annexed to the Park, and not to the land, for 18. H. 6. 21. a Park may not be without the grant of the King, and the Common Law saith, if a man prescribe to have Tithes in a Vineyard, if the Vineyard be converted to another use, the Tithes are gone, for it is said tantum est prescriptio, quantum est possessio, and vouched Coneys case, 14. Caro. who prescribed to be discharged of paying Tithes for a meadow, and afterwards this was converted to arrable, and the opinion of the Court was, that the prescription is gone, and the rather in our case, because it is by the act of the party himself that the Park is destroyed, & yet he agreed the principal case in Lutterels case, Coo. 4. for there a new will is only a translation of the old, and no destruction of the thing which was before: but in our case the Park it self is destroyed by the act of the party himself, and therefore the prescription which was annexed to this is gone forever. 2. Dan. 604. p. 3. 2. Dan. 607. p. 2.

Also this prescription is against Common right, and therefore shall be taken strictly, as Teringhams case Coo. 4. a man had Common appurtenant in another mans land; and he purchased parcel of the same land, the Common is gone, because this Common is against Common right, but otherwise of a Common appendant, and he cited Wilds case Coo. 8. according to our case, that a prescription to pay a Buck, and a Doe for the Tithes of a Park is against Common right, for though Tithes are not due Iure divino; yet they are due jure humano & Communi; and therefore the prescription is not founded in Law, and it shall not be intended to the Park, when that is destroyed and converted to arrable, as if a man made a feoffment of land with warranty, and afterwards the land is improved and made of greater value, then that was at the time of the feoffment; if in this

case

Mich. 20. *Jac. C. P.*

caſe the feoffee is evicted and leaſe that, and recovery in value upon the warranty, he ſhall recover in this caſe, only the value that this was at the time of the feoffment made, and not according to the value, that the land is of at this day by the improvement, 32. E. 3. Entry 81. and in our caſe it ſhall be intended, that by compoſition at the firſt this preſcription had beginning, and the compoſition only extended to the Park, and not to a new thing, and for that reaſon the preſcription is gone in this caſe, and he cited a caſe in this Court, M. 10. Iac. Rot. 1223. in a prohibition between Roux C. D. the Plaintiff ſuggeſted, that ſuch land was parcel of a Park as in our caſe, and that the owner had uſed to pay the ſhoulder of every Doe which was killed, and 2. s. annually for all Tithes, the Defendant pleaded that this was diſparked, and the firſt opinion of the Court was, that the Defendant ought to plead in certain how that was diſparked, ſecondly, this was doubted whether the modus as to the 2. s. was gone in regard, that the ſhoulder of the Doe is gone by the diſparking, out of which he collected that the modus is annexed to the Park, and not to the land, and ſo he concluded, and prayed a conſultation.

Hooper v. Andrews. 2. *Dan.* 608. *p.* 5.

Winch ſaid to him the preſcription is found againſt you, and therefore you ought to have demurred; Hendon, if the preſcription is gone, the Plaintiff ſhall not have a prohibition; and at another day judgement was commanded to be entered for the Plaintiff, if no other matter is ſhewed by ſuch a day, Hobert and Winch being only preſent.

judgement.

The Biſhop of *Gloceſter* againſt *Wood.* *Poſt*, 57.

IN a Truver and converſion brought by the Biſhop of Gloceſter againſt Wood, upon a ſpecial verdict, the caſe in effect was, that the predeceſſor of the now Biſhop was ſeiſed of the Mannor, of D. and he let 20. acres of that to A. and B. during the lives of 3. of their Children rendring 27. s. rent per annum, and alſo paying and delivering to the Biſhop and to his ſucceſſors, two of the beſt beaſts upon the death of every one of the Ceſtuy que vies, and over the jury found, that after the leaſe of the 20. acres, the ſame predeceſſor let all the Mannor, rendring the antient rent to Wood the Defendant, and after one of the Ceſtui que vies died, and he ſeiſed two of the Cattle for a herriot, and whether this appertained to Wood the leſſee of the Mannor, or to the Biſhop was the queſtion, and it was argued by Serjeant Hendon, that this appertaines to the Plaintiff, and not to Wood: and as to that the ſingle point, is a Biſhop: is ſeiſed of a Mannor in the right of his Biſhoprick, and lets parcel of that for life, whether the reverſion of this parcel be alwayes parcel of the Mannor notwithſtanding this leaſe, and he argued that it was not, and yet he agreed, that if another let, as aforeſaid, the reverſion continues alwayes parcel of a thing in poſſeſſion, and that in the caſe of the King himſelf, as appears by Dyer 230. if the King lets parcel of a Mannor for life, the reverſion of this parcel paſſeth to the King, for the reverſion had all times continuance in the ſame capacity, and no alteration is made of this by force of the leaſe, but where the leaſe for life is a diſcontinuance, there he gaines a new reverſion, and this ſhall not be parcel of the Mannor, and for that if a man is ſeiſed of a Mannor in the right of his wife, and he lets parcel for life, this is a diſcontinuance, and he had gained the reverſion in his own right, and for that reaſon the reverſion may not be parcel of the Mannor, as appears by 18. Aſſiſes: and alſo he held if Tenant in taile lets parcel of a Mannor for life, that were the reverſion of this parcel, is not parcel of the Mannor for the cauſe aforeſaid; and ſo in our caſe, when the Biſhop granted parcel which is not grantable by the Statute, now he had diſcontinued the reverſion, and had gained a new fee ſimple which may not be parcel of the Mannor, ſo long as this new fee ſimple had a continuance, and this was his firſt reaſon.

And

And ſecondly, he argued from the intent of the parties, becauſe the intent was, that the leaſe to Wood ſhall be good, and if the reverſion of the 20. acres paſs to Wood, this will make all the leaſe void, for no rent may be reſerved out of the reverſion, but out of the land it ſelf, 3. Aſſiſe Placito ultimo, a Biſhop let land, and a hundred, rendring rent, the rent iſſues out of the land, and not out of the hundred, and ſo here it iſſues out of the land, and not out of the reverſion, which made the leaſe all void; and ſo he concluded the firſt point, that the reverſion of the 20. acres did not paſs to Wood the leſſee of the Mannors. Mich. 26. Jac. C. P.

Secondly, when the Biſhop lets 20. acres of ground rendring rent, and this is not confirmed by the Dean and Chapter as it ought, and after he lets the Mannor, and the ſucceſſor accepts the rent of the Mannor, this acceptance ſhall not make the leaſe of the 20. acres to be good, admitting that the reverſion do paſs; and when the Biſhop had made a leaſe for 3. lives he may not contract for the reverſion, and when a leaſe is meerly void in the creation, there no acceptance afterwards may make that good; but admitting this to be againſt him, yet the leſſee ſhall not have the Herriot, for they are not appendant to the reverſion, but due only by way of Covenant; and the words are yielding &c. and this being a Collateral thing, it ſhall not go with the reverſion; and the Herriot here may not be had without it be delivered by the leſſee for life. Secondly, it is paid only in the name of a Herriot, and this is not Herriot ſervice. Thirdly, it is to be paid upon the death of a ſtranger, and not upon the death of the leſſee, and all this proves this Herriot to be collateral; and he cited Rawlins caſe, a leaſe for years paying for a fine 20. l. this is a ſumme in groſs, and ſhall not paſs with the reverſion; and ſo he prayed judgement for the Plaintiff.

Attoe contrary; and yet he agreed the caſe of the husband and wife, and of the Tenant in tail, for here the leſſor gaines a new fee ſimple, but in our caſe, when the Biſhop lets for life, this is not any wrong, for the ſucceſſor may enter, and he ſhall have this leaſe not in his natural capacity, but always in his politique capacity, and for that there is an apparent difference between the caſes; and for that reaſon, he held that the reverſion was parcel of the Mannor, and ſo paſſed to the leſſee, and as to that which had been ſaid, that the intent of the parties was only, that the Mannor in poſſeſſion, and not the parcel in reverſion ſhould paſs to the leſſee, for that is moſt beneficial to the leſſor, to this he anſwered that by expreſs words this is granted, and no conſtruction ſhall be made contrary to the very expreſs words of the grant, and here though the Defendant had not any title at all to the Herriot, yet the Plaintiff ſhall not have a trover and converſion for this, becauſe that he himſelf had not right to this, and for that reaſon judgement ſhall be given for the Defendant; and he alſo argued, that the leaſe of the reverſion is not meerly void, but voidable, and then the acceptance extends to this: ſee 37. H. 6. the leaſe of a Prior 2. E. 6. B. Abbots caſe. Upon which authorities, he ſaid clearly by the Common Law this leaſe of the reverſion is not meerly void but voidable, and for that the confirmation of the Dean and Chapter, after the Statute of the firſt of Eliz. had not altered that; and for that a leaſe after that Statute ſhall not be meerly void, and ſee Lincolns Colledge caſe, Coo. 3. and in our caſe there is a poſſibility, that the leſſee of the Mannor may ſurvive the ceſtui que vies of the 20. acres, and that poſſibility is ſufficient to make this good out of the reverſion, for then the leſſor may diſtrain for his rent, but where no poſſibility of a diſtreſs is, there no rent may be reſerved; as in Iewels caſe, the leaſe was void, for there was no poſſibility that the leſſor ſhall ever diſtrain, but in our caſe the leaſe for years is good, for the leſſor is not without his remedy, for he may have an action of debt upon this reſervation; 1. H. 4. 2. there a meſnalty in groſs was let rendring rent, and good, for by poſſibility the Tenant may die without heires, and yet this is a remote poſſibility; 12. E. 3. execution 112. a reverſion granted by fine in tail rendring rent, is good; and Coo. 5. Elmers caſe, that a reverſion being let for life rendring rent, is a good reſervation at the Common Law; and he

Mich. 20. *Jac. C. P.*

be held without question, that where a Bishop is seised of a Mannor which consists part of freeholders, and part of Copiholders, that a lease of the Mannor rendring rent is good; and in our case the reservation of the rent is intire, and shall bind the successor: and as to that which had been said, that the Herriot is Collateral, and shall not go with the reversion, to this he answered, that if it is meerly Collateral, then it shall not go to the successor of the Bishop but to his executors, as if the lessee had covenanted or obliged himself to pay this Herriot to the successor, he may not have benefit of this obligation, but the executor of the Bishop who was lessor shall have that, and so he said, that the argument made by Hendon is against him, for if it be meerly Collateral, then this shall not go to the successor, and though the lessee of the Mannor may not have it, the Plaintiff shall not have a Trover and Conversion as he said before: but he held this good by way of reservation, for modus & conventio vincunt legem, and as to that which hath been said, that the Herriot is to be paid upon the death of a stranger, and not upon the death of the lessee himself, to this he answered, that this is nothing, for the payment shall be out of the beasts of the lessee, and not out of the beasts of a stranger, and so he concluded and prayed judgement for the Defendant.

Rives case.

SAlmon avowed for a rent charge, and he shewed that Sir Robert Rives had a rent charge granted to him, and he further shewed a discent of that to the son and heir of Sir Robert; and shewed that the rent was behinde unpaid to him viz. to his son and heir, and he avowed as Bailiff to the son, and exception was taken to the avowry, because it is not expressly alleadged in whose time the rent was due, whether in the time of the father, or in the time of the son, for if it is behinde in the time of the father, the son may not distrain for that: but it was resolved that the avowry was very good, for in almuch that he had shewed, that the rent was not paid to the son, this implied the rent was due to the son, and not to the father.

An Executor brought a Scire Facias upon a judgement given for the Testator in debt by him, and the Defendant would have pleaded the death of the Testator between the verdict and the judgement, & per Curiam he was not suffered, for he may not plead this in a Scire Facias, but the Defendant is put to his writ of error.

In Trespass for beasts taken in London, and the Defendant justified to taking as a distress upon a lease of land in Kent, and the Plaintiff replied that the Defendant sold the beasts in London, and so not a good plea to bring the Trial out of Kent, and to have that tried in London, which note.

Batterseys case.

1 Dan: 44. p. 19. S. C. Hutt: 53. S. C. by the name of Fletcher v. Harcourt.

AN action upon the case was brought against one Hordecre upon an assumpsit, and he declared that the Defendant had arrested one Battersey, by vertue of a Commission of Rebellion out of the Cinque ports, and that the Plaintiff keeping a Common Inne, the Defendant brought the said Battersey to his Inne, and requested the Plaintiff to keep him a day and a night, and promised in consideration there upon that he would save him harmless; and he shewed that he kept the prisoner accordingly; and that the said Battersey brought an action of false imprisonment against him, and recovered against him, upon which the action accrewed: and upon non assumpsit pleaded, it was found for the Plaintiff, and now it was moved in arrest of judgement, because he had not shewed that the said Battersey was

was lawfully arreſted and impriſoned, and then if a man will without cauſe arreſt a man, and promiſe in this caſe, no action will lie, for it is no conſideration becauſe that the impriſonment is unlawful, but Hobert chief Iuſtice, Hutton and Winch contrary: for be the impriſonment lawful, or not lawful, he might not take notice of that: as if I requeſt another man to enter into another mans ground, and in my name to drive out the beaſts, and unpound them, and promiſe to ſave him harmleſs, this is a good aſſumpſit, and yet the act is Tortious, but by Hutton, where the act appears in it ſelf to be unlawful, there it is otherwiſe, as if I requeſt you to beat another, and promiſe to ſave you harmleſs, this aſſumpſit is not good, for the act appears in it ſelf to be unlawful, but otherwiſe it is as in our caſe, when the act ſtands indifferent, but Hobert ſaid, it may be there is a difference between a publick officer, and a private man, for if the Sheriff arreſt a man unlawfully, and promiſe as before, this is a good aſſumpſit, but perchance otherwiſe of a private man as here, but in the principal caſe, the Defendant had pleaded non aſſumpſit, and this implies a Lawful impriſonment, for otherwiſe the Defendant might have given the unlawful impriſonment in evidence, and judgement was commanded to be entered for the Plaintiff.

Mich. 20 Jac. C. P.

1. Dan: 45. p. 20. S. P. Hutt: 56. S. P. 2. Lev: 174. Allen v. Rescous, S. P.

Claworthy againſt *Mitchel.*

CLaworthy againſt Mitchel in a replevin, the Defendant avowed for a rent, and ſhewed that his father was ſeiſed, and let for years rendring rent, and he died, and that the reverſion deſcended to him, and for rent behinde he avowed; in barre of which avowry the Plaintiff ſaid, that the father deviſed the reverſion to another, and the other maintained his avowry, and traverſed the deviſe; and it was found that the deviſe was only of two parties, and not of the third part, for in very truth, the land was holden by Knights ſervice, and all this was found by ſpecial verdict, and for whom the jury had found was the queſtion; and it was argued by Hendon, that this verdict is found for the avowant, and he vouched 32. H. 8. Brook iſſue 8. in a precipe quod reddat, if the iſſue be whether A. and B. infeoffed the Tenant, and it is found that A. infeoffed him, but not that A. and B. infeoffed him, the iſſue is found againſt the Tenant, ſee 14. E. 4. and Dyer 260. in debt upon a leaſe for years of divers parcels of land, and upon non demiſit pleaded, it is found quod demiſit all except one parcel, this is found for the Plaintiff, and 1 rin. 15. Iac. Rot. 2022. Allen againſt Soper in a replevin for a horſe, and avowed for damage feſant, and the Defendant claimed Common for his beaſts Levant and Couchant upon his land, and ſome in this caſe were found Levant and Couchant, and others not, and it was found againſt the Plaintiff, and he ſaid in this caſe, when the Defendant had alleadged a deviſe of all the land, and upon this iſſue is joyned, and it is found that part is deviſed and not all, this is found againſt the Plaintiff, becauſe the iſſue is joyned upon a particular and a ſpecial point, whether all was deviſed or no, and yet he agreed that upon a general iſſue as in treſpaſs in 20. acres of land, and the Defendant is found guilty but only in one, yet the Plaintiff ſhall have jungement, but not where the iſſue is joyned upon a particular point as here, but admitting that the Plaintiff ſhall have judgement, yet the avowant ſhall have return for the third part; as in debt upon a leaſe for years, and it is found that he had not cauſe to demand all the rent, but that it is ought to be apportioned, yet he ſhall have judgement for the reſidue, and ſo here: Aſhley Serjeant to the contrary; the jury have found for the Plaintiff, for the avowant had avowed for all, and he alleadged 26. Aſſiſe, where in an aſſiſe the ſeiſin and the diſſeiſin was found, and yet becauſe there was no Tenant found of the Frank-tenement, the Plaintiff ſhall have judgement, and as to that that had been ſaid, that the avowant ſhall have return for part, he denied that, for now it appeared by the ſpecial verdict, that the avowant and the deviſee are Tenants in

Mich. 20. *Jac. C. P.*

Common, and Tenants in Common ought to joyn in avowry: and for that reaſon the avowant ſhall not have return for any part, but he ought to replead, Dyer 177. ſee the book; Hobert ſaid, that without queſtion in this caſe, if the jury had given a general verdict, this had been againſt the Plaintiff, for it was not deviſed, if all was not deviſed according to the iſſue: and then if it would have been againſt the Plaintiff in this caſe of a general verdict, the ſpecial verdict ſhall be conſtrued to be of the ſame nature in law, and it ſhall be adjudged by us againſt the Plaintiff, for generally where the general iſſue ſhall be againſt any of the parties, there the ſpecial verdict ſhall be of the ſame degree, and Winch and Hutton agreed, and by Winch who pleads in the affirmative, ought to prove all to be true, as in the caſe of Soper, which had been remembred by my brother Hendon, and by Hutton, every iſſue which is taken upon abſque hoc ought to be preciſely found: and as to the ſecond point, he held that the avowant ſhall have return for part, for here the jury have found the third part of the reverſion in him, and by that there appears a ſufficient certainty to the Court to make an apportionment, & then if the Court may make an apportionment, the avowant ſhall have return for ſo much as is due to him, but if the apportionment is to be made by the jury, and not by the Court, there the avowant ſhall not have return for the third part, but if it was in debt for 40. l. and the jury finde 20. l. the Plaintiff ſhall have judgement of that part to be apportioned by the jury: and ſo in Treſpaſs, if part be found for the Plaintiff, he ſhall have judgment, for the demand is by writ, but in our caſe it is an avowry, and it is a certain iſſue, and for that reaſon the avowant ſhall not have return for the third part, adjourned; Hutton alledged 28. H. 8. 32. and at another day judgement was commanded to be entred for the avowant, Hobert, and Winch being only preſent.

2. *Dan.* 787. *pl.* 8.

Note, that if a man make a leaſe of ſeveral parcels of land in a Town, and this is for the trial of a title in an ejectione firme, he ought to enter into every part of thoſe ſeveral, and to leave a ſervant, or other to keep the poſſeſſion till he had entered into every parcel: and then to deliver the leaſe of all, and this is good.

Empſon and *Bathruſt* before. 20.

Hutt. 52. *Poph.* 176.

The caſe of Empſon againſt Bathruſt was moved again by Harris, and he praied judgement for the Plaintiff, and it had been ſaid, that this obligation is void by the Statute of the 23 H. 6. but he held that this Statute did not extend to this obligation, for it is only where a ſheriff takes a bond of any perſon which is in his ward, and yet he ſaid, he never found in any book the Sheriff might exact any fee of any perſon, for he is an officer of the King, but 21. H. 7. he may preſcribe to have a bare fee, but the Statute of 23. H. 6. appoints little fees in ſome caſes. Secondly, he argued in this caſe, that the Sheriff may take a bond for by 29. of Eliz. this is a due debt to the Sheriff; and then if the Sheriff give the partie day till another day, it is good reaſon he ſhall have a bond for that for his ſecurity. Thirdly, he held that the Sheriff may take this bond of the party after the extent, and before the liberate by the Statute of the 29. Eliz. for otherwiſe perchance when the Sheriff had made the extent, perchance the Comuſee will not ſue out the liberate, and ſo the Sheriff ſhall be defeated of all his labour and travel taken in the extent: and in the laſt place he ſaid, that in caſe the ſumme exceeds a 100. l. the Sheriff ſhall have 6. d. in the pound for that which exceeds, and 12. d. for the firſt hundred pound: but it was reſolved by Hobert, Winch, and Hutton, that judgement ſhall be given againſt the Plaintiff, and firſt they agreed this obligation not to be within 23. H. 6. for the partie was not in the ward of the Sheriff, and ſo was reſolved in Bewtages caſe. Secondly, it was agreed by the ſaid 3. Juſtices, that the Sheriff may not take his ſalary appointed by the Statute, till a compleat execution, viz. till the liberate, for the words of the Statute are in the negative,

Pl. Co. 99.

negative, and doth not eſtabliſh the fees, but only tolerates them, and Hobert ſaid, if the Sheriff made an extent, and before the liberate a new Sheriff is choſen, then in this caſe the new Sheriff ſhall have the fees appointed by the Statute, and not the antient Sheriff: and by Hobert, if the Conuſee ſue an extent, and then refuſe to ſue the liberate to the intent to defraud the Sheriff of his fees, the Sheriff ſhall have his remedy by his action upon the caſe; and by Hutton, if the Sheriff return upon the extent, that he is ready to deliver that to the Conuſee, this is ſufficient to intitle him to his action upon the caſe, and thirdly, it was holden by Hobert, and by Winch, that the Sheriff ſhall have but 6. d. in the pound for all, if it exceed 100. l. for ſo was the intent of the Statute, but Hutton ſaid, that the Common practiſe is otherwiſe, and Hobert ſaid, that he did not value that, for he knew well enough that the Sheriff will rather take more then leſs then their fees, and though it had been ſaid, that if ſuch a Conſtruction ſhall be made, then the Sheriff ſhall have as much for executing 100. l. as 200. l. to this he ſaid, the Sheriff ought to take this ſubject to this caſually, for it is the very words of the Statute: and laſtly, it was reſolved by Hobert and Winch, that the obligation was void by the Common law, and extortion, and a taking by the Colour of his office, ſee Dive and Manninghams caſe, and Hobert ſaid, that every bond that is taken for any thing which is malum in ſe is void by the Common law, and this extortion is malum in ſe; and ſo void by the very Common Law, ſee Ouleys caſe 19 Eliz. in Dyer; but Hutton doubted whether this bond is void by the Common Law, becauſe the Statute of the 23. H. 6. inflicts ſo great ſpecialty upon the Sheriffs for extortion: and after judgement was Commanded to be entred for the Defendant in the action, if no other matter be ſhewed to the contrary before ſuch a day. Mich. 20 *Jac. C. P.*

In treſpas quare vi et armis one ſuch being his ſervant cepit et adduxit at D. in Eſſex, the Defendant pleaded that he was a vagrant in the ſame Countie, and he not having notice that he was ſervant to another, he retained him; and it was moved by Finch, if I retain the ſervant of another man in the ſame Countie where I and his Mr. inhabit, this is not juſtifiable, though in veritie I had not notice of that, and this according to the expreſs book of the 19. Ed. 3. 47. Hobert, the book may not be law, for it is a hard matter to make me take notice of every ſervant, which is retained in the ſame Countie, and yet perchance if this retainer be upon the Statute of labourers, at the Seſſions this is notorious, and I ought to take notice of that at my peril, but it is otherwiſe of a private retainer; for though it is within the ſame Countie, yet being a private matter in fact, the Law will not compel me to take notice of that at my peril, otherwiſe if this be matter of record, 2. H. 4. 64. and Hobert and Winch ſeemed to agree, and then Finch moved that the Plaintiff had charged the Defendant with his ſervant by cepit et adduxit, and the Defendant excuſed himſelf, and never traverſed cepit et adduxit, ſee 11. H. 4. Hutton and Hobert, the receiving and the entertaining of a ſervant may not be ſaid to be vi et armis.

Mr. *Spencers* caſe.

HArvy Serjeant came to the barre, and demanded this queſtion of the Court, in the behalf of Mr. Spencer, a man was ſeiſed of land in fee; and ſowed the land, and deviſed that to I. S. and before ſeverance he died, and whether the deviſee ſhall have the Corn, or the executor of the deviſor was the queſtion: and by Hobert, Winch, and Hutton, the deviſee ſhall have that, and not the executor of the deviſor: and Harris ſaid 18. Elizabeth Allens caſe, that it was adjudged, that where a man deviſed land which was ſowed for life, the remainder in fee, and the deviſor died, and the deviſee for life alſo died before the ſeverance, and it

Mich. 20. *Jac.* C. P.

was adjudged that the executor of the Tenant for life ſhall not have that, but be in remainder: and Winch Juſtice ſaid that it had been adjudged, that if a man deviſe land, and after ſowe that, and after he dies, that in this caſe the deviſee ſhall have the Corn, and not the executor of the deviſor, nota bene.

Dodderidge againſt *Anthony*, Entred Mich. 19. *Jac.* Rot. 1791.

ENt. Mich. 19. Jac. Rot. 1791. Peter Dodderidge brought an action of accompt againſt one Anthony, and he declares that he delivered to the Defendant ſo many pieces of cloath, called Bridge-water red to be ſold at Bilbo in Spain, and the Defendant ſaid, that he ſold the ſame cloath at Bilbo in Spain for 40. l. 18. s. Engliſh, to be paid in May next inſuing, the ſale which was in November before, and ober he alledged the Cuſtome of Merchants to be, that if any Merchant had goods in the ſame Kingdome to be ſold to another Merchant, and he ſell the goods to be paid at a day to come, and this is done before a publick Notary, and thereby a Bill ſigned and acknowledged to him or in his name who ſold the goods, and that if the Merchant who ſo ſold the goods, delivered the Merchant who was owner of the goods, this Bill ſo taken in his name, this ſhall be a diſcharge to him of the goods: and he averred that he ſold them to a Spaniſh Merchant, and that he took a Bill accordingly, and at London offered that Bill to the Plantiff, who refuſed that, and upon this plea the Plantiff demurred. Attoe argued that the plea is not good, becauſe he had not alledged that the partie who takes ſuch a Bill may plead that, and the Cuſtome is alſo alledged with an (if) if the party ſell, and if he take the Bill, and not with poſitive averment, that he may ſo ſell and may ſo take the Bill, which being delivered to the owner of the goods, ſhall be a diſcharge to the factor who ſold the goods: and here this cuſtome is not good by the Common Law, for if I deliver goods to another to ſell, and he ſell them to be paid the money at a day to come, this is not good, for he ought by his ſale to make a compleat contract: and if I ſell my horſe for 10. l. I may retain the horſe till the money is paid, for till then the contract is not compleat; and ſo in this caſe, and here the Plantiff ſhall have an action of accompt upon this delivery, and if he ſell them otherwiſe, or do not ſell them for ready money, he had gone beyond his Commiſſion, and this Cuſtome is unreaſonable, that the Bill ſhall be taken in his name who ſold the goods, but perchance if the cuſtome had been alleadged, to take the Bill in the name of the owner of the goods, this had been good; but in our caſe the owner of the goods may not ſue, nor have any remedy for his goods, except the factor will go into Spain and ſue the ſaid Bill, and it is unreaſonable to leave this to the pleaſure of my factor, whether I ſhall have any remedy for my goods ſold, and it is very unreaſonable that I ſhall be paid with a Bill which may not be ſued, and here the Plantiff is a ſtranger to the Cuſtome of *Spain*, and ſhall not be bound by that.

Serjeant Harris to the contrary: the Cuſtome which is alledged is good among Merchants, though it is not good according to our Common Law, and ſo if two Merchants trade jointly, and one of them dies before ſeverance of the goods, yet his executor ſhall have his part, and not the Surviver, and ſo by the law of Merchants a man cannot wage his law in debt upon a ſimple contract; by which it is apparant that the laws of Merchants differ from our laws, and indeed the laws of Merchants are National laws: and that this is the Cuſtome in *Spain* is confeſſed by the demurrer, and then we may not examine that by the reaſon of our laws, and the laws of Merchants ought to be favoured for trading ſake, which is the life of every Kingdome; and by the law of Merchants a Bill without ſeal is good, and yet by our law it is but an eſcrowl: and ſo I pray judgement for the Defendant. Hobert chief Juſtice, when the Merchant had delivered goods to the factor to ſell,

he

he had made the factor negotiator geſtorum: and for that reaſon the factor may ſell the goods without ready money, and this is good reaſon, for perchance the goods are of that nature that they will not keep without periſhing, by which clearly it appears, that if I deliver goods to another to Merchandiſe, and to ſell, he may ſell them without ready money, but if my factor or Bailiff will ſell them to one which he knows will prove a Bankrupt without ready money, this is not good: but ſecondly, he held the cuſtome, as it is here alledged, not to be good, for then the partie ſhall have no remedy for his money, except the factor will go into Spain and ſue the Bill, and the laws of Merchants are ſpecial laws for their benefit, and not for their prejudice: and this cuſtome as it is alledged is too large: but if he had alledged that ſuch Bill taken by the factor ſhall be as good and effectual to the Mr. as if it had been taken in his own name, this had been good, beſides the cuſtome is not good, for it is alledged to be that when the factor had delivered the Bill to the owner of the goods, this ſhall be a diſcharge to him who was the factor, and here is no time ſet within which this may be delivered, and ſo for ought is ſhewed it may be delivered 10. years after, which may be good; and to that which had been ſaid, that the laws of Merchants are national laws, he denied that, for every Kingdome had its proper and peculiar laws, and though this is the law of Spain, and national to them, yet this ought to be reaſonable, or elſe it ſhall not binde: and judgement was commanded to be entered for the Plaintiff, Hobert and Winch being only preſent. Mich. 20. Jac. C. P.

It was ruled that he who had land in a pariſh who did not inhabit there, ſhall be chargable to the reparation of the Church, but not to the buying of ornaments of the Church, for that ſhall be levied of the goods of the pariſhioners, and not of their lands, by Sir Henry Yelverton, and ſaid to be ſo formerly adjudged.

In treſpas the Defendant pleads, that one Such was poſſeſſed of a term for years, and being ſo poſſeſſed by his laſt will and Teſtament deviſed that to the Defendant, and died, after whoſe death the Defendant entered, and was poſſeſſed by vertue of the deviſee, upon which plea the Plaintiff demurred generally: and Hutton thought this plea prima facie to be good, though the Defendant had not expreſſly alledged that the deviſee died poſſeſſed, but his plea implies that, for he had ſaid, that he entered by vertue of the deviſee and was poſſeſſed, and this only matter of form, and not matter of ſubſtance, and no cauſe of general demurrer, which Winch alſo granted that this was alſo matter of form, and not matter of ſubſtance.

Gage againſt *Johnſon* for his fees.

GAge brought an action againſt Johnſon as his ſervant and Solicitor to the Defendant in a ſuit in the Kings Bench taking for every Term 3. s. 4 d. for his fees, and for this he brought his action of debt: and Serjeant Hitcham moved in arreſt of judgement, and he urged the caſe of Samuel Leech, an Attourney of this Court, in an action upon the caſe brought by him, upon a promiſe to pay ſo much for the ſoliciting of a cauſe of the Defendant, and the opinion was, that the action will not lie, for it is in nature of maintenance, for a Solicitor may not lay out money for his Clyent: and if an action upon the caſe will not lie, then much leſs an action of debt: and Hobert ſaid, that a Counſellor may take fees of his Clyent, but he may not lay out or expend money for him, and the ſame law of an Attourney, for if he did diſburſe money for him, he doubted much what remedy he ſhould have: and he further ſaid, a ſervant may follow buſineſs for his Mr. and may take money for his labour, for if I retain my ſervant generally, he is not bound to ſollow my ſuits at law, except at his pleaſure, for that is an extraordinary ſervice:

Mich. 20. *Jac. C. P.*

ſervice: and for that if I will ſay to my ſervant, that if he will follow my buſineſs at Weſtminſter, I will give him ſo much for his pains, my ſervant in this caſe is not without his remedy: but if his ſervice is coupled with Soliciting to take money for his pains, his opinion was that no action will lie, to which the other juſtices alſo agreed, and they aroſe.

Wright againſt *Black* before. 28.

NOw the caſe of Wright and of Black was moved again, and the caſe was, that Wright had brought an action upon the caſe againſt Black and Black, for that the Defendants intending to make away his good name, and to cauſe him to loſe his goods, did maliciouſly and without cauſe at Norwich in the County of Norfolk, preſer a Bill of indictment at the Seſſions of peace, containing that the Plantiff ſtole two bundles of ſetches, and alſo did cauſe and entice one I. S. to give in evidence that the indictment was good and true, by reaſon of which he was bound to Anſwer that at the next Aſſiſes, and there he was acquitted: and whether the action was maintainable was the queſtion, and Attoe argued that the action is maintainable, though it is not ſhewed that the Bill of indictment was found: and he vouched a caſe, which was Hill. 10. Iac. B. R. Rot. 921. between Whorewood and Cordery and his wife Defendants, which caſe and judgement was after affirmed in the Exchequer Chamber upon a writ of error, and the caſe was, that the Plantiff declared that the Defendants intending to take away his good name, did charge him to have raviſhed Dorothie Coxe, and maliciouſly exhibited a Bill of indictment, containing that the Plantiff did felloniouſly raviſh the ſaid Dorothie their daughter, and did give this in evidence to the Grand jury who found Ignoramus: and yet it was adjudged that an action lies, and he cited a caſe the 19. Iac. in B. R. Deney againſt Ridgy, where was----only an indictment preferred concerning the ſtealing of a horſe, and no more, and yet an action lies. Hobert chief Juſtice ſaid, that it ſeemed to him that it is actionable, for this is as great a ſcandal to give this in evidence to the Grand jury, as to publiſh this upon an Alebench: and as the courſe of Juſtice ought not to be ſtopped, ſo neither ought the good name of man in things which concern his life be taken away without good cauſe, and I have heard that judgement was given another Term for the Plantiff, but quere better of that.

Hoes caſe. *Ante*, 30.

Hutt. 60. 1. Jon. 16.

HOes ſeiſed of land in fee, he deviſed that to his wife for life, the remainder of one parcel of that to Thomas his eldeſt ſon, the remainder of the other parcel to his youngeſt ſon in fee, and this deviſe was with proviſo that the ſame ſhall pay his legacies, and alſo his will was, that in caſe his wife died before the payment of his debts and legacies, that then his two ſons ſhall pay them, and if it happen that either of them die before his debts and legacies paid, or before either of them do enter into his part, that then the other ſhall have all the land in fee, and after the deviſor died, and in the life of the mother the eldeſt ſon releaſed to the youngeſt all his right, title, Claim, and demand to the land which was deviſed to him by his father, and after the wife died, and two points came in queſtion in this caſe. Firſt, whether this limitation is good. Secondly, whether the releaſe is good, and it was argued by Richardſon Serjeant, that this limitation of the Statute by way of deviſee is good, and he vouched Dyer 330. Clarks caſe, and 4. Eliz. Goldley and Buckleys caſe, a man deviſed to his ſon and his heirs, provided that if his perſonal eſtate did not ſuffice to pay his debts and legacies, that then his lands ſhall be to another, and he vouched Brown and Pells caſe, which

Cro. Jac. 590. Bridg. 113. Palm. 131. 2. Ro. Rep. 196. 216. Godb. 282.

was

was adjudged in Banco Regis, the case was, that a man had two sons, William the eldest, and Thomas the youngest, and he devised his lands to Thomas his son and his heirs, provided that if Thomas died without issue living, that then William shall have the land, and it was resolved that this was good to William by way of executory devise, and in that case doubt was moved whether if Thomas suffer a recovery, whether this shall take away the estate of William; and it was holden by all the Court, except Doderidg, that it shall not, but all agreed that this devise upon the future contingency is good, and so he concluded, that if the youngest son die in the life of the Mother, and before the legacies are paid, the land shall remain to the Plaintiff, according to the intent of the devisor: but the other doubt is, when the Plaintiff did release all his right, and claim to the other, whether this release will extinguish this future possibility; and he held that it will not: and he said that he had seen the case of Lampet Coo. 10. and there the release of a possibility is penned as in our case, and if any word discharge this possibility, it is this word right, but if the resolution of that book had not been against him, he would have argued that this right was not sufficient to extinguish this future possibility, but that there ought to be a more apt and proper word, but he said he would not argue against books: but he said that which he would insist upon was the distinguishing of possibilities, for there are two manner of possibilities, the one is Common and ordinary, the other is more remote and forreigne. And first, there is a possibility which is Common and necessary, and this depends upon an ordinary casualty, as a lease for life, the remainder to the right heirs of I. S. for it is apparant that the right heirs of I. S. may take by this, and such a possibility may be released: and a possibility which is remote and forreigne is, as if a lease be made for life, the remainder to another during the life of the lessee for life, or a lease for life, the remainder to the Corporation of B. those remainders are void: but yet by possibility they may be good, for in the first case the Tenant for life may enter into religion: and in the latter case the King may make Corporations, and yet because such possibilities are not usual, the remainders are void: see Coo. 2. Chamleys case, where such a remote possibility may not be released, if a man give land to one which is married, and to another woman which is married, and to the heirs of their two bodies ingendred, this is a good estate tail, for there is a common possibility that they may intermarry, but if the gift be to a man and to two women who are married, and to the heirs of their bodies ingendred, they shall not have an estate tail executed, for it is a remote and forreigne possibility, and an imbrodery of estates which the law will not allow, nor respect: see the Rector of Chedingtons case, that such a possibility as in our case may not be released, for first here the mother ought to be dead before the Plaintiff shall have land. Secondly, legacies ought to be paid. Thirdly, Thomas ought to be dead, and till all these possibilities hap, the Plaintiff shall have nothing in the land, and for that it is a remote possibility which is not gone by the release, for as it is said, when a possibility shall be gone by a release, there ought to be a good foundation upon which the release may operate: secondly, the possibility which is released ought to be necessary and Common, but in our case it is not necessary that the son shall enjoy it in the life of his mother: and also the mother may in a short time pay the legacies, and then neither of the sons shall have the land: by which circumstances it is apparant, that this is not a Common or ordinary possibility, but is a remote and forreigne expectancy, which shall not be gone by this release, and this differs from Lampets case, for there was a possibility of a Chattel, which as it may easily be created, so it may easily be destroyed, but in our case it is a franktenement, which as that requires a greater ceremony in the creation, and for that it will require a greater matter to destroy, and to extinguish that; and it is said in Woods case cited in Shelleys case Coo. 1. that if a man covenant with A. that if I. S. infeoffed him of the Manor of D. that then he will stand seised to the use of him and his heirs of the Manor of B. and the Covenantee died, and the said I. S. infeoffed the Covenantor, in such case the heir shall

Mich. 2 C. *Jac. C. P.*

be

Mich. 20. Jac. C. P.

be inward, and yet it is only a possibility which descends, which possibility of an use may not be discharged, or released, and yet in that case there was a possibility which is more Common, and ordinary then in our case; for there was a possibility that I. S. should make the feofment, and so lay a good foundation upon which the release may operate: and he put the case that I. shall let for so many years as I. S. shall name, if I. S. name it is good, and yet he held if I. S. release before the nomination that this release is meerly void, because he had only a possibility: and as to Digs case Coo. 1. there a power of Revocation may be released, and good reason, for the Covenantor who released had the bird in his own hand, and for that it was no remote possibility: but there it is said, that if the power be limited to an estranger, there the stranger may not release: and he also agreed Albanics case, for there the power to release was upon the death of a man only, but in our case it is upon death, and other contingencies by which these remote possibilities shall not be released. Hoes case Coo. 5. there a release of all actions, and demands to the Bailee made this void; and in the case of Brown and Pell which was remembred before, it was the opinion of all the Court against Judge Doderidge, that where the devise was to the son in fee, and if he died without issue living, that then his eldest brother shall have that, if in this case the second son suffer a recovery, yet this had not destroyed the possibility which the eldest brother had to have the land, and if a common recovery which is matter of record, and the common assurance of the realm will not take away this possibility, a fortiori a release which is but matter of fact, and so he concluded and prayed judgement for the Plaintiff.

Bawtry to the contrary, and he said, that if this remainder shall be good, then the inconvenience which the judges had always endeavoured to take way shall be on foot again, as in the case of Chamley, and Corbets of springing uses, for if it shall be lawful for a man to limit a fee upon a Collateral condition or limitation, then there shall be a perpetuitie, and for this if any literal construction shall be made upon such conveyances, this will introduce dangerous events to inheritances, and for that he held that limitation to the Plaintiff to be meerly void, for when the land is devised in fee, this devisee by this had an absolute estate in fee, and it shall be strange to give this to another though this be by way of devise, for though the will of every man shall be supplied by the intent of the devisor, yet his intent ought to stand with the rules of the law, and otherwise his intent shall revert, and for that he cited 29. H. 8. a man made two executors, provided that one of them shall not administer, here the intent did plainly appear, and yet because the intent is contrary to the power which the law gives to every executor, therefore it is void: and it is put for a bare rule in Corbets case, that such a conveyance which a man may not make in his life time, by act executed, he may not make by his Will, but a man may not make such a conveyance by act executed in his life time, for as it is said in Colthirsts case, if a man let for life, the remainder for life, upon condition that if the first lessee do such a thing, that then the land shall remain over to a stranger, this remainder is void: for when the land is given before, this second limitation is meerly void: and also the case is put, that if a man give lands in fee upon condition, the remainder over this remainder is void; for the other had an estate in fee before, by which it is apparant, that when an estate is one time lawfully vested in any certain person, there no limitation may give that to a stranger, by any act executed in his life at the common law, and then it shall not be good by way of devise 28. H. 8. Dyer, a term was devised for years, the remainder over: and it was adjudged by Baldwin, and by Shelley, that the remainder in that case is void, for when the devisor had given his term, he may not limit this remainder over, though this be by way of devise: and this may be good law notwithstanding Lampets case, for there the lease was devised and not the land, and for that reason may be a difference: and he vouched the case which was remembred by Richardson 29. H. 8. 33. and then as to the second point, he held that the release was good, admitting

mitting the firſt point to be againſt him, for if the eldeſt ſon had any right by this releaſe, then this word right in the releaſe will deſtroy and extinguiſh that, and this poſſibility is not remote and forraigne, for the condition or limitation is annexed to the eſtate, and is not a ſubſequent condition which creates an eſtate, and this depends upon an ordinary caſualty which is common to all men, and the payment of debts and of legacies, is incident and common to every executor; and as for Albanies caſe Coo. 1. the caſe was, that a man had a power to revoke uſes upon the death of a ſtranger without iſſue, and reſolved that this power may be releaſed, and yet his power depended upon two contingencies, death, and death without iſſue, and the caſe is alſo there put, if A. infeoffe B. upon condition, that if B. Survive C. and then if A. and his heirs pay to B. 10. l. that then he ſhall enter, in this caſe there are many contingencies involved in one conveyance, and yet it is there ſaid, that theſe contingencies may be releaſed; and in Lampets caſe Coo. 10. there are ſix reaſons, wherefore ſuch a contingencie may be releaſed, and our caſe is within all the reaſons which are there mentioned, for the words in the releaſe as have been remembred by my brother Richardſon, are all one with our caſe, and the firſt reaſon is, becauſe this is a Chattel, which as it may be eaſily created, ſo it may be eaſily deſtroyed, to this he gave anſwer, that this remainder of a Term was an intereſt to him who releaſed: and ſo in our it is an intereſt of a remainder to the Plantiff, and for that the releaſe is good. Secondly, it is a maxime in Law, that every land may be charged one wayes or another, and we are within this reaſon alſo, for if this eſtate be in the Plantiff, then this may be releaſed. Mich. 20. *Jac. C. P.*

Thirdly, the foundation of every act ought to be regarded, for Grants caſe there vouched deſtroyes the poſſibility with a fine by reaſon of the original act, the fourth reaſon there remembred is, becauſe that if the devilee had been dead, his Executor ſhall have the intereſt, the ſame reaſon in our caſe, if the Plantiff had been dead before the remainder or the contingencie hap, yet his heir ſhall have that. See Shelleys caſe; the fifth reaſon is, the legacie was in preſent, though this was to take effect in futuro, and ſo in our caſe the Will is in preſent, though the ſtate is to take effect in futuro, and ſirthly, it ſhall be againſt reaſon to eſtabliſh ſuch a perpetuity of a Chattel, and ſo in our caſe it ſhall be againſt reaſon to eſtabliſh a perpetuity of a franktenement: and the releaſe is very well penned, for it is of all his title, right and claim to the reverſion, and remainder which the father deviſed to the Plantiff, and ſo the releaſe is not general, but this is a particular, and ſpecial releaſe of that which was deviſed to him by his father, and Hoes caſe Coo. 5. is not like to our caſe, for firſt there the duty was altogether incertain, and ſecondly, the condition there did precede the duty: but in our caſe the condition is annexed to the eſtate, and ſo he concluded and prayed judgement in the caſe for the Defendant.

Finis M. 20. Jac.

The Biſhop of *Gloceſter* againſt *Wood* before. *46.*

NOw the caſe between the Biſhop of Gloceſter and Wood was adjudged, Hobert and Winch being only preſent: and firſt it was reſolved by them, that when the Biſhop let parcel, as 20. acres for life, and after he lets the Manor it ſelf to another rendring rent, in this caſe the rent iſſues out of the intire Manor, for if in debt for the rent, the leſſor do declare upon a demiſe of the Manor omitting the reverſion of this parcel, the declaration is evill: and upon non dimiſit pleaded it ſhall be found againſt him. Secondly, this they held, that the Herriot reſerved ſhall go with the reverſion: and if this do not go with the reverſion to the leſſee of the Manor, yet the Plantiff ſhall not have the Herriot, and then though the Defendant had not good title to the Herriot, yet if the property

Hill. 20. *Jac.C.P.*

of the Herriot do not appertain to the Plantiff, he ſhall not have a trover and converſion, for the Defendant had the firſt poſſeſſion: and judgement was commanded to be entred for the Defendant, if no other cauſe was ſhewed before next thurſday.

Bulloigne againſt *William Gervaſe* Adminiſtrator.

2. Ro. Ab. 622. pl. 33.
Hutt. 53. S.C.
1. Brownl. 43.

BUlloigne brought an action of debt upon an obligation of 12. l. againſt William Gervaſe Adminiſtrator to I. S. and the Defendant pleaded, that the inteſtate died outlawed, and that the outlawrie alwayes continued in force, and upon this the Plantiff did demur generally, and it was argued by Attoe for the Plantiff, for the plea is not good, for this is a plea only by way of argument, that he ſhall not be charged for this debt, becauſe he had not aſſets: and in this caſe, this outlawrie ought to be given in evidence, upon nothing in his hands being pleaded; and it ought not to be pleaded in barre, for by poſſibility the outlawrie may be reverſed, and then the Adminiſtrator ſhall be charged if he had any goods, and he vouched a caſe in this Court, Trin. 27. Eliz. Rot. 2954. Worley againſt Bradwel and Dame Manners his wife, Adminiſtratrix to Sir Thomas Manners, and the feme pleaded outlawrie in the inteſtate, and the Plantiff demurred generally, and it was adjudged to be no plea; and note, that the record was brought into the Court, and read accordingly. Hitcham Serjeant to the contrary, the record in Manners caſe was not well pleaded, for the Defendant only ſhewed, that a Capias ad ſatisfaciendum iſſued againſt the Teſtator, and did not ſhew any recovery, or judgement againſt him, and that was the reaſon of the judgement in that caſe, and the Plantiff here ought to have demurred ſpecially, as the caſe of 27. of Eliz. for otherwiſe he ſhall not have advantage of this plea: and the plea is only evil for the manner, for it is apparant that by the outlawrie of the Teſtator all his goods are forfeit, and this is the reaſon of the book of 16. E. 4. 4. it is a good plea in an action of debt to plead an outlawrie in the Plantiff, and to demand judgement of the action, and not judgement of the writ, for the debt is forfeit to the King by the outlawrie; Hobert, Hutton, and Winch, the preſident ſhewed by Attoe is not anſwered, for though the pleading of the outlawrie is without ſhewing of a recovery, and judgement, yet the outlawrie is good till it is reverſed; and Hutton ſaid, that in ſome caſes an Executor or Adminiſtrator had goods, though the Teſtator died outlawed, as if the Teſtator let for life rendring rent, and the rent is behinde, and after the Teſtator is outlawed, and dies, this ſhall not be forfeit, but his Executors ſhall have the rent, and if a man make a feofment upon condition, that the feoffor pay 100. l. to the feoffee, and his heirs, or Executors, and the feoffee is outlawed, and the feoffor pay the money to his Executors as he may well, the Executors, and not the King ſhall have that, alſo if the Teſtator is outlawed, and he deviſe his land to his Executors to be ſold, theſe moneys ſhall not be forfeit, and they ſhall agree that the plea was not good notwithſtanding the general demurrer, for he who will barre another by an argumentative plea, his plea ought to be infallible to all intents and purpoſes, and ſo it is not here, for the Executors and the Adminiſtrators may be charged by the having of goods, though the Teſtator was outlawed, and for that the plea of the Defendant is not good in ſubſtance; and the general demurrer is good, by Hobert, and by him if we ſuffer this plea, then the Defendant will keep the goods, and not reverſe the outlawrie, nor yet ſatisfie the King; alſo if he had not goods, the Defendant may plead plene Adminiſtravit, or nothing in his hands, and give this outlawrie in evidence. See 8. E. 4. 6. 3. H. 6. 32. 39. H. 6. 37. by the opinion of Priſot, and alſo ſee the caſe in E. 4. 5. a caſe to this purpoſe; and alſo note well that it was ſaid concerning the caſe of Manners, that a writ of error was

was brought or that afterwards; and that the caſe remains till this day unde- Hill. 20.
termined. *Jac.* C. P.

Buckley againſt *Simonds* Ent. 18. *Jac.* Rot. 2120. *Anke*, 35.

NOw at this day the caſe of Buckley and Simonds was argued by Iuſtice Hutton, and by Winch; and the caſe was briefly this, Anne Buckley Adminiſtrator to Andrew Buckley her Husband was Plaintiff in a quare Imp. againſt John Simonds, John Prior, and Robert Pierce, Alias Price for diſturbing her to preſent to the Church of D. and ſhewed that Andrew Buckley Grandfather of the Husband of the Plaintiff, was ſeiſed of the ſaid advowſon in groſs, and preſented one I. S. and he dies, after whoſe death the advowſon diſcended to Richard Buckley, and that the Church became void, and that one Richard Williams uſurped upon the ſaid Richard Buckley then being within age, and that Richard Buckley alſo died, and by his death the ſaid advowſon diſcended to Andrew Buckley as brother and as heir to Richard, and that the Church became void, and before the preſentment by Andrew, and within 6. moneths Andrew died, and that the Adminiſtration of the goods of Andrew were committed to the Plaintiff, and that ſhe preſented within 6. moneths, and the Defendants diſturbed her, and the Defendants pleaded in barre, and confeſſed the ſeiſin of the Grandfather as is alledged in the declaration, and they ſaid, that the ſaid Andrew Buckley 14. Eliz. by his Indenture made between the ſaid Andrew Buckley on the one part, and John Preſton of the other part, by which the ſaid Andrew Buckley by the ſame Indenture covenanted with Preſton in conſideration of a marriage to be had between John Buckley and Elizabeth Preſton, daughter of John Preſton, he covenanted with him and his heirs, that immediately after the death of him and of his wife, the ſaid advowſon (inter alia) ſhall be to the ſaid John Buckley his ſon, and to Elizabeth Preſton, and to the heirs of John, and ſo the Defendant claimed by vertue of a leaſe for 1000. years made by John Buckley, and the Plaintiff demanded Oyer of the Indenture which was read to this effect, that Andrew Buckley by the ſaid Indenture covenanted with Preſton, that in conſideration of a marriage between his ſon and the daughter of Preſton, that he will grant a rent charge of 6. l. 13. s. 4. out of his land at Weymouth, and at Melcombe Regis payable at 4. uſual feaſts; and he Covenanted for him and his heirs, that he would convey the land in Melcombe Regis and Wike Regis to ſuch perſons as Preſton ſhould appoint, provided that the ſaid Andrew Buckley and his wife may injoy that during their lives without impeachment of waſte, and covenanted that immediately after their deaths, the lands ſhall immediately remain, come, and be to the ſaid John Buckley, and Elizabeth his wife: and that the advowſon of Bradway ſhall remain, come, and be to the ſaid John Buckley and Elizabeth his wife, and upon all the matter the queſtion was, whether by this laſt covenant, an uſe will ariſe of the advowſon in Bradway to John Buckley, for if an uſe is raiſed to him, then this leaſe made by him is good, and by conſequence the title of the Defendants is good to preſent to this advowſon, and if not, then the fee alwayes remained in Andrew Buckley, the Grandfather, and by deviſe diſcends did come to Andrew Buckley the Husband of the Plaintiff, and then the quare Impedit is maintainable.

And Hutton began his argument, he argued that no uſe will ariſe to John Buckley by this Indenture, for when a man will raiſe an uſe by way of covenant, there are 4 neceſſary things which ought to concur. Firſt is a ſufficient conſideration as of blood, or marriage, or other Collateral conſiderations, as if I covenant with you, that when you infeoffe me of certain land, I will ſtand ſeiſed to the uſe of you and your heirs, this is good, but if the conſideration be for money, then

Hill. 20. Jac. C. P.
Moor, 687.
Cro. Eliz. 344.
Poph. 47.
(a) Moor, 342.
Cook 1. Noy, 19.
Cro. Eliz. 401.

this ought to be inrolled, or otherwiſe no uſe will ariſe, the ſecond point is, there ought to be a deed to teſtifie this agreement, for otherwiſe no uſe will ariſe, as was reſolved 38. Eliz. in Collard and Collards caſe. Thirdly, he who covenants ought to be ſeiſed of the land at the time of the covenant, as was reſolved (a) 37. Eliz. in Yelvertons caſe; a man covenanted to ſtand ſeiſed to the uſe of his ſon of ſuch lands as he ſhould afterwards purchaſe, and it was holden void, becauſe he was not ſeiſed at the time of the covenant: and laſtly, the uſes muſt agree with the rules of the Common law, and he cited Chudleys caſe, a man covenanted to ſtand ſeiſed to the uſe of one for years, the remainder to the right heirs of I. S. this remainder is void, though this is by way of covenant, and uſe, for the freehold may not be in abeyance: and ſo if I will at this day bargain and ſell my lands in fee, they ſhall not paſs without the word heirs, for it was not the intention of the ſaid Statute, to raiſe uſes in ſuch manner contrary to the rules of the Common law or uſes which are uncertain, and in our caſe the intent was, that no preſent uſe ſhall ariſe, for out of the ſame land is granted a rent charge to Iohn Buckley and Eliz. his wife, by which it appears plainly, that it was not their intent that any preſent uſe ſhould ariſe by the delibery of the indenture: and if the uſe do not ariſe preſently upon the delibery of the Indenture, it ſhall never ariſe at all; alſo the intent appears, for it is, that the land ſhall remain free from incumberances, and this ſounds only in covenant, and for this reaſon the covenants ſhall be of the ſame nature, and laſtly the covenant is, that the land ſhall remain and be, and this is altogether incertaine, and for this no uſe will ariſe, becauſe this failes of words, as if I covenant to leave my land to my ſon after my death, this will not raiſe an uſe to my ſon, no more then if I covenant with the friends of my wife, that after my death ſhe ſhall have my goods, this will not make my wife to be Executor: and he vouched 21 H. 7. 17. 34. H. 8. 59. the Lord Borroughs caſe Dyer 355. 166. 324. and ſo he concluded, that judgement ought to be given for the Plaintiff.

Iuſtice Winch argued to the ſame purpoſe, and he ſaid the firſt part of the covenant contains, that there ſhall be a marriage before ſuch a day if the parties ſhall agree, and the ſecond part is a covenant, that the feme ſhall have 6. l. 13. s. for her joynture, and if this covenant executed an uſe of the land preſently, then this deſtroyes the joynture, which was not the intention of the parties. Thirdly, there is another covenant to convey Copyhold land, and if this covenant do raiſe an uſe, then it will follow that Iohn Buckley ſhall have the land, though the marriage do take effect, and beſides the covenant doth create an uſe preſently, or not at all, and then when this uſe is to be raiſed by this covenant which contains in that nothing but future and Executory matter, this will not create a preſent uſe: and he cited the books which were vouched at the barre, and by Hutton, and ſo he concluded, that this covenant will not raiſe an uſe preſently to Iohn Buckley, and that judgement ought to be given for the Plaintiff.

And at another day the caſe was argued by Hobert chief Iuſtice for the Plaintiff, and that no uſe will ariſe by this covenant, and he ſaid, if I will covenant to make aſſurance of my land to my ſon, or to a ſtranger, this covenant is meerly nugatorie, and will not raiſe an uſe, but on the contrary, if I will covenant to ſtand ſeiſed to the uſe of my ſon, though there is alſo a covenant to make further aſſurance, yet this will raiſe a preſent uſe, for the covenant is declaratory, and not obligatory, and ſo is Dyer 235. and there was no word to aſſure the land, or to ſtand ſeiſed to uſes, but only that the land ſhall come, remain, and be in tail, or in fee, and there was no word to aſſure the land: and this caſe is agreeable to the caſe of 21. H. 7. 18. by Rede, that no uſe will ariſe; and the reaſon is plain, becauſe the covenantor had election, in which manner he ſhall have that, whether by deſcent, or in any other manner, for if I covenant that my land ſhall deſcend to my ſon after my death, no uſe will ariſe by this covenant, and he put the caſe in Chudleys caſe, that if a man covenant that after his death his ſon ſhall have his land

land in tail, it is ſaid that the ſon ſhall have an eſtate executed by the Statute of 27. H. 8. and the covenantor ſhall have an eſtate for life, and ſo the law makes in that caſe fractions of eſtates, as the caſe of the Lord Seymor Dyer 96. ſeems to accord with this, and beſides thoſe two books he ſaid he could not finde any book which will warrant that, and for that reaſon he held thoſe two books to be no law, for if I Covenant, that my ſon ſhall have my land after my death, this will not raiſe an eſtate to me by implication for life, and an eſtate to my ſon, and ſo by ſuch means to change my eſtate in fee, for an eſtate for life without more words, for the word covenant in his proper and native ſignification is only obligatorie, and yet it hath been alwayes conceived ſufficient to raiſe an uſe to him who is not partie to that, as if I covenant with a ſtranger, that I will ſtand ſeiſed of my land to the uſe of my ſon, this will raiſe an uſe to my ſon, and yet neither my ſon, nor the covenantee may have an action of covenant, but an uſe will very well ariſe to my ſon, as if a man bargain, and ſell his land in conſideration of 100. l. paid by I. S. though in this caſe the conſideration ariſeth from a ſtranger; yet that will paſs the uſe to the bargainee: and in caſe of covenant, it is not this word covenant only which creats the uſe, but it is rather the agreement of the parties which is teſtified by the covenant, for if ſufficient agreement appears, there will not need this word covenant, as if I will agree and declare to ſtand ſeiſed to the uſe of my ſon, by which it appears that the word covenant is onely declarative of the intentions of the parties; and then in the principal caſe the covenant is, not that the ſon ſhall have the land, but that the land ſhall come, remain, and be to him: and thoſe words are incertain as 21. H. 7. revert, come, or diſcend: and for that reaſon it is all one with the law of the ſame caſe, and then void to raiſe any uſe for the incertainty: and then when Andrew Buckley covenants, that his ſon ſhall have his lands and no words to inforce his intention: and for that reaſon the intention ſhall be lyable to an action of covenant, and not to change his eſtate which he hath in fee, for an eſtate for life by this covenant, but if he had expreſly covenanted that in conſideration of marriage of his ſon, that he would hold his land for life, and after this ſhould be to his ſon, this will change the eſtate which was in fee, for an eſtate for life, but in our caſe the covenant being general and left to the indifferent conſtruction of the law, the word covenant ſhall be taken in his proper and native ſignification, and this is obligatorie: and ſo he concluded, that this covenant being at the firſt to grant a rent, and was executory, and the laſt part of that is executory for aſſurance: and the limitation of the eſtate to the ſon being intangled between theſe two Covenants, this ſhall be of the ſame nature; and by conſequence the covenant is obligatorie only, and will raiſe no uſe to the ſon: and ſo he concluded, that judgement ſhall be given for the Plaintiff, and it was commanded to be entered accordingly. Hill. 20. *Jac.* C. P.

Sparrow againſt *Sowgate.*

2. Dan. 498. pl. 8.
3. Dan. 674. pl. 2. S. C.
3. Jon. 29. S. C.
Hutt. 47. S. C.
Godb. 354.
Raymond 14

IN debt by Sparrow againſt Sowgate, who declared that the Defendant became Bail for one Richard Sowgate in Banco Regis, againſt whom the Plaintiff had brought a Bill of debt of 77. l. and now the Defendant bound himſelf in a Recognizance of 77. l. upon which the action is now brought, that in caſe judgement ſhould be given againſt the ſaid Richard Sowgate, that he ſhall ſatisfie the ſaid judgement, or render his body to priſon, for in this caſe no part was impoſſible, for after the judgement the principal may render himſelf, in B. R. to the Marſhal for the redemption of his ſuretie, and that is the Common courſe here as he ſaid, but he agreed the caſe to be otherwiſe, if a ſcire facias iſſue out of the Kings Bench againſt the Bail, for there the death of the principal is a good plea: for a ſcire facias doth not lie there till default is aſſigned in the principal, in his not coming upon the capias ad ſatisfaciendum, which may not be when he is dead.

Hill. 20 *Jac. C. P.*

dead. Note that, but yet before any capias, it is clear he may have an action of debt.

Sir Robert Hitcham Serjeant of the King to the contrary, and he alledged this to be the conſtant courſe in the Kings Bench, that the Bail is never chargable till there is default aſſigned in the principal upon the return of the Capias ad ſatisfaciendum, which may not be here, for the principal is dead; and he agreed the caſe of the other ſide, that when a man is to do two things though the one is become impoſſible, yet he ought to perform the other: but when it is in the election of one to make either the one or the other, then it is otherwiſe; ſee Dyer 262. and ſo he concluded for the Defendant. Hobert chief Iuſtice ſaid, that it is inconvenient that the Plantiff ſhall be forced to ſue his Capias ad ſatisfaciendum againſt the partie, before he have execution againſt the Bail, for perchance he will ſue a fieri facias or an elegit againſt him, and that the Corps of the partie will not ſatisfie him: and Browlow Prothonotary ſaid, that it had been adjudged in this Court, that ſuch plea is not good: Winch, the courſe of the Kings Bench is, that default ſhall be aſſigned upon the return of the principal before the Bail ſhall be charged: and though the Plantiff refuſe to take his bodie after he had made his election to take his fieri facias or elegit, he ſhall never more reſort to the Bail, which was granted by Hobert and Hutton, as to that laſt point: and it was holden by all the Court, that if the principal render his bodie, though the Plantiff refuſe to take that, yet that is a diſcharge of the Bail, and alſo it was agreed by Hutton, Hobert, and by Winch; that if the courſe of the Kings Bench be ſuch, that the Bail ſhall not be forfeit till there is a default aſſigned in the principal, the ſame courſe alſo ſhall be followed here: and per Curiam if the courſe of the Kings Bench be ſuch, that ſuch Capias is neceſſary to be awarded, that then a convenient time ſhall be allowed for the principal to render his bodie gratis, and if the principal do die before ſuch time the Bail is diſcharged; but it was ſaid by Winch, if he die before convenient time, and the Capias is awarded, that ſuch death ſhall not diſcharge the Bail, note that Iones Iuſtice ſaid, that he thought in this caſe, that it is neceſſary that the principal render himſelf gratis, for when he is let to Bail, the law ſuppoſeth him to be always in cuſtodie, and to be forth comming: and for that reaſon he ought to appear within a convenient time when the Plantiff demands him, which Hobert alſo granted, but he ſaid that there needs not any demand, if the courſe of the Kings Bench is contrary: and Iones Iuſtice ſaid, that he had a judgement given in the Kings Bench, that the bail is forfeit after default is aſſigned in the principal, and Winch ſaid, that the courſe of the Kings Bench is, that default ought to be aſſigned in the principal, upon the return of the Capias before the Bail ſhall be charged: and it was agreed, if that courſe be there, it ſhall be obſerved here alſo; but it was ſaid by Hutton, that there ought to be a ſcire facias awarded, and returned againſt the Bail, before the Bail is forfeit; and it was adjourned until another time that they might ſee preſidents.

Cyprian Web againſt *Barlow.*

CYprian Web brought a replevin againſt Barlow, and the Defendant abowed as leſſee for life of the Mannor of Froſton, to which the Plantiff is a Copiholder of a Copihold of the ſame Mannor; and that 15. Iaco. in menſe May he girdled and cut a tree in the middle upon his Copihold, and that the ſteward Anno Supradicto charged the homage to finde this, by which he had forfeit his Copihold, and the Defendant being Lord of the Mannor diſtrained his beaſts damage feaſant, and the Plantiff ſaid, that the cuſtome of the Mannor is, that every Copiholder may lop and girdle abſque hoc that he cut the tree, and upon that the Defendant demurred, and Attoe argued for the Plantiff in the replevin, that this is no cauſe to forfeit the Copihold, for though the ſteward did charge the homage to finde that,

that, yet it doth not appear, that he gave any proof of that. And ſecondly, the forfeiture is alledged to be in May; and the Court was holden in April before, which was impoſſible, which the Court granted as to that laſt point, and for that the Plaintiff had judgement. East. 21. *Jac. C. P.*

Thorntons caſe in a Prohibition.

THornton prayed a prohibition to the Arches, and the caſe was ſuch, one had a recovery in a quare Impedit, and he had a writ to the Biſhop againſt Thornton, upon which A. his Clark was admitted &c. and after the recoverer died, and Thornton ſuppoſing his heir to be in the ward of the King, and that the ſaid A took another benefice without ſufficient qualification, by which the Church was void by Ceſſion, and he attained a preſentation of the King, and he was admitted &c. by the Lord keeper being within the Dioceſs of Lincoln; and A. ſued him in the ſpiritual Court, and Thornton prayed a Prohibition, and it was granted per Totam Curiam, for without queſtion there ought nothing to be queſtioned in the ſpiritual Court, after the induction of the partie, and whether it is a Ceſſion or no, doth properly belong to the Common Law: and Iones cited a judgement in Williams caſe accoʒding, note that by the conſtitution of Otho and Othobon; that inſtitution and induction is voidable in the ſpiritual Court, if no Prohibition be prayed.

Sheldon againſt *Bret*.

IN a quare Impedit, between one Sheldon and Bret, Hutton ſaid, that we in Chancery have adjudged, that the grant of the next avoydance for money when the Parſon was ſick in his bed ready to die is Simony, for the Statute is, if the contract be made directly, or indirectly by any way or means.

Fleming againſt *Pitman*.

Hutt. 63. S.C.

FLeming brought an action of Covenant againſt Pitman, and he declared upon an indenture, and that the Defendant Covenanted to ſerve him honeſtly and faithfully, as an apprentice in the myſtery of Drapery for ſeven years, and that he had detained him of his goods &c. the Defendant pleaded the Statute of the 5. of Eliz. that none ſhall be an apprentice to any of the moſt worthy trades, (among which Drapery is one,) except his father have freehold, to the value of 40. s. per annum to be certified to the place in which he is to be apprentice, by three of the Juſtices of the peace of the ſame County, and this certificate to be inrolled in the Town book; and he pleaded that no ſuch certificate was made, and he pleaded the branch of the Statute of the 5. of Eliz. which made every retainer contrary to the form of this Statute to be void; and the Plaintiff replied that he had 40. s. per annum; and the Defendant rejoyned, that he had not 40. s. per annum; upon that the Plaintiff demurred, becauſe the Defendant ſaid in his rejoynder, that he had not 40. s. per annum, and in his plea he pleaded no ſuch certificate; and the Juſtices &c. Hutton, Hobert, and Iones ſaid, that the retainer is good, though there is not any ſuch certificate, or inrolment, if re vera the father had 40. s. per annum, for the intent of the Statute is, that ſufficient mens ſons ſhould be apprentiſes, which is obſerved if the father had 40. s. per annum, and Winch cited Englefields caſe upon the Statut 28. Eliz. cap. 3. that every one which claims by a conveyance from a Traitor, ſhall bring in his conveyance to the Chequer to be inrolled; and yet if it be brought in, though it be not inrolled, the intention of the Statute is fulfilled, and Iones cited a caſe in Banco Regis 18. Eliz.

Eaſt. 21. *Jac. C. P.*

Eliz. Robins caſe, upon the Statute of 21. H. 8. of Pluralities, where it was adjudged, that a diſpenſation is good, though it is not inrolled; and yet there are as ſtrong words of inrolment as may be.

And after in Trinity term 21. Iac. the ſame caſe was argued again by Attoe for the Plantiff, and by Hitcham for the Defendant, and per totam Curiam at that time it was agreed cleerly, that this is a departure; but for the ſecond point, whether the pleading of the certificate were good or no, that was the doubt; and Iuſtice Hutton thought there ought to be a certificate precede the indenture, or otherwiſe that ſhall be void; but Hobert, as to that would not give his opinion, but he ſeemed as Hutton, and Hobert chief Iuſtice took exception to the laying of the action, for he thought the Statute of the 5. of Eliz. ſhall not be intended ſo ſtrong againſt infants, as to make Collateral covenants to be good: but Attoe moved that this covenant is incident to the retainer to ſerve truly and faithfully, and yet if it were a Collateral covenant, yet he had loſt the advantage of that by his pleading, as in debt upon an obligation againſt an infant, if he plead non eſt factum, he ſhall not have advantage of his Infancy, to which Hobert alſo agreed; but he ſaid, this is not like to our caſe, for here it appears by the Count of the Plantiff, that the Infant was but of the age of 15. years at the time of the retainer, of which the Court ought to take notice: and here the Infant was not bound by this Covenant at the Common Law, and no Collateral covenant ſhall be maintainable upon the Statute, for this being againſt an Infant, it ſhall be taken ſtrictly, as a cuſtome that one ſhall infeoffe, yet that cuſtome will not warrant him to leaſe and releaſe: and as to that which had been ſaid, that it is incident to every retainer to ſerve truly and faithfully, that is very true, and an action upon the caſe lies upon a covenant in law, but not upon the covenant in fact, he ought to have Collateral ſecuritie, which was alſo confeſſed by Hutton, and he ſaid moreover, that the retainer is for the benefit of the Infant, that he learn his Trade, but the covenant here is for his diſadvantage, and for the advantage of his Mr. and for that reaſon it is void, as if an Infant had covenanted to pay 10. l. for the learning of his Trade when his time was up. Winch Iuſtice contrary to that laſt point, for he thought the covenant to be incident to the retainer, and good though he is an Infant, as an Infant who leppes a fine, is alſo inabled to make an indenture to lead the uſes; and note that Hutton, and Hobert ſaid alſo, that the barre of the Defendant is good, viz. the pleading of the want of the certificate, and for that reaſon the replication of the Plantiff, that he had 40. s. per annum is evil, and though the rejoynder of the Defendant is evil, and a departure; yet it appears that the Plantiff had not any cauſe of action: and for the covenant they ſaid, that they two are ſtrong in their opinions; and upon that Winch agreed alſo, that judgement ſhall be given againſt the Plantiff: and Attoe moved the Court, what remedy the Plantiff may have, for the loſs is 500. l. and per totam Curiam he ſhall not have an action of accompt, for that lies not againſt an Infant being an apprentice, Coo. 11. 89. and the Court ſaid, that as to the retainer, and the damage, it is no more then if an Infant had been retained by word, and there is not any remedy, but an action upon the caſe, and Attoe ſaid, that they had thought to have brought an action of Trover and converſion, and he doubted whether that will lie, and after the Court ſaid to him, you had beſt to bring an action upon your caſe, and it was afterwards ordered by Arbitrement.

Oxford and his wife againſt *Goldington.*

IN a Prohibition for Oxford and his wife againſt Goldington to the Court of Audience, for they are ſued there for a legacie deviſed to the Plantiff, by one George Cotton, and this is as they are Adminiſtrators to one William Cotton, who was executor of the ſaid George: for that he libelled againſt the Plantiffs

in

in the Prohibition in the Court of Audience, and had ſhewed that they had goods of the firſt Teſtator, and a Prohibition was awarded; and Finch moved for a conſultation, and he ſaid, if by the ſpiritual Law an Executor waſts the goods of the Teſtator, and after dies inteſtate, that in this caſe his Adminiſtrator ſhall anſwer, that viz. the debts and the legacies of the firſt Teſtator: and Doctor Pope who was preſent in the Court ſaid, that the Law was ſo, and ſo he ſaid the Common Law was, that is the Statute of 31. E. 3. which gives the ſame remedy againſt an Adminiſtrator as againſt an Executor, if the Executor die inteſtate, for it is the intereſt of the firſt Teſtator, upon which the Adminiſtration ſhall be committed to the next of the Kin: and if none will take that upon them, then the Adminiſtration of the Executor ought: and ought to take ſeveral letters of Adminiſtration for that: and if no letters of adminiſtration is taken, and yet he meet with the goods, he ſhall be charged as an Executor of his own wrong, and if no goods be of the firſt Teſtators, then it is no reaſon that he ſhould be charged: and the Statute of 31. E. 3. gives no remedy, (per Curiam) but againſt the immediate Adminiſtrator; and if the caſe be as you have alleged, then the Legatee or the debtee is at no damage, or miſchief, for he may ſue the Adminiſtrator of the firſt Teſtator if he had goods, or any other who had goods as Executor of his own wrong, and if none will take letters, nor yet meddle with the goods, then the debtee or the Legatee may take letters of Adminiſtration himſelf, and ſo no conſultation was awarded, but the Prohibition ſtood. East. 21. Jac. C. P.

Avis againſt *Gennie* and others.

ONe Avis brought an action of Treſpaſs, of his cloſe broken againſt Gennie and two others: and the writ was general, but in the the declaration he affirmed that to be in Apring half a Rood, and in digging another half Rood, and after in his new aſſignement ſhewed that to be a Sellion containing by eſtimation and acre, and it was found for the Plantiff, and damages aſſeſſed to 20. s. and now it was moved in arreſt of judgement by Attoe, becauſe the new aſſignement is more large then the declaration, and the opinion of the Court was, that becauſe this was but an action of Treſpas where damages only is to be recovered, that this is very good, but otherwiſe it is, perthance if that had been in an ejectione firme.

Brigs caſe.

2. Dan. 610. p. 3.

BRigs brought a Prohibition againſt another, and alledged that the Dean and Chapter of D. was ſeiſed of the Mannor, and the Defendant being Vicar, ſued to have Tithe in Court Chriſtian, and ſhewed that time beyond memory &c. they had held that diſcharged of Tithes for them and their Tenants, and that they let that to the Plantiff, and it was moved by Hendon Serjeant, that the Dean and the Chapter are a bodie Politique, and temporal, which are not capable of this preſcription, in non decimando Cdo. 2. the Biſhop of Wincheſters caſe, Hobert ſaid, that the Dean and Chapter are a bodie ſpiritual, and are annexed to the Biſhop throughout all England, and if the Biſhop is capable of that as it is plain he is, then the Dean and Chapter is alſo capable of that, which was granted by Hutton: but Winch doubted, for Winch ſaid he may be a lay man, and for that the Plantiff ought to averre that he is a ſpiritual perſon; Hutton confeſſed that the Dean may be a lay man, as was the Dean of Durham by ſpecial licence, and diſpenſation of the King; but that is rare, and a ſpecial caſe, and is not common, and general, and therefore not to be brought as an example, which was alſo granted by Hobert chief Iuſtice, and upon that, day was given

East. 21. *Jac. C. P.*

over to the Defendant to ſhew cauſe wherefore the Prohibition ſhall not be granted.

Anne Summers caſe in Dower.

A Writ of Dower was brought by Anne Summers againſt the Tenant of the land, and he pleaded a fine with proclamations levyed by her husband, 14. Iac. in which year the husband died, and the wife had not claimed within the Statute of the 4. H. 7. cap. 24. the demandant replied, that 15. Iac. ſhe brought a writ of Dower againſt the now Tenants, and againſt two others, and that the writ abated by the death of the two others, and that ſhe brought a writ by Iourneys accompts, the Tenant replied, that the others were not Tenants, but one Sir Iohn Web, and it was moved that this rejoynder was evil, for they confeſſed that they themſelves are Tenants, by which the writ is good againſt them at the leaſt; Hobert, if ſhe brought a writ of Dower againſt one who is not Tenant, that is not any claim within the Statute; but if ſhe brought a Dower againſt 4. who are Tenants, and two die; and ſhe bring a writ againſt the others by Iourneys accompts, this is a good claim within the Statute, though the ſecond writ was after the time limitted, but quere here if the two who died, were not Tenants.

Trin. 21. *Iac. C. P.*

Harvey againſt the *Hundred* of *Chelſam*.

Cro. Jac. 677. 2. Ro. Rep. 394.

HArvey brought an action upon the Statute of Wincheſter; of Hue and cry againſt the Hundred of Chelſam; and it is found for the Plantiff, and a writ of error was brought, and all the record was certified; and now the Plantiff prayed two things may be amended, the firſt is the title of the action, for upon the roll it is an action upon the caſe, it ſhould be an action upon the Statute, but it was ſaid by Hobert, that it ſhall not be amended, for the Statue of the 18th. of Eliz. did not give amendments upon indictments, or upon popular actions, or actions upon penal Statutes; and cited a judgement in Doctor Huſſes caſe Coo. 9. 71. which was reverſed in Banco Regis, upon default in pleading being upon a penal Statute, and ſo in Mich. Term laſt Judicatari for Indicatari, and adjudged that it ſhall not be amended: and the ſecond point was, upon the venire facias where was one Gregory returned, as appears by the names of the Jury; but the Clark of the Aſſiſe returned one George, and it was entered upon the roll and certified in the record to the Kings Bench; and per totam Curiam there needs no amendment, for that name of George where it ſhould be Gregory, being in the tales de circumſtantibus, and not in the principal panel, and it was alſo by conſent of the parties; and as to the firſt point, all the Court agreed with Hobert; and for the ſecond point Hobert ſaid, that if that variance had been material, it ſhould not be amended, for we will not make a new certificate, for the Court of the Kings Bench may chooſe to credit the firſt or the ſecond certificate, and ſo we ſubmit our judgements to the cenſure and pleaſure of another Court, which we will not do: and in the great caſe of Fulger 18. Iac. where we have ſuch a new certificate, though it was adjudged according to our opinion; yet they would not credit our laſt certificate; and therefore we will not make a certificate again; which note well.

2. Dan. 205. pl. 5. Hut. 65. S. C. 1. Jon. 41. S. C.

Haſſet againſt *Hanſon*.

HAſſet brought an ejectione firme againſt Hanſon, and upon a general iſſue, and a ſpecial verdict the caſe was this, that one Woodhouſe was leſſee for years

yeares of the King of a Mannor, and I. S. was a Copiholder of a Tenement of inheritance, and the Coppiholder bargained, and ſold his Coppihold land in ſuch a Town to the leſſee of the Mannor, and this was by indenture, and the indenture was to this effect, that he bargained and ſold all his lands and Tenements, as well Coppiholds, as other land bought of Iohn Culpepper in ſuch a Town: and it was found that the leſſee of the Mannor entered in the Coppihold, and occupied, and after that the ſaid I. S. died, after whoſe death W. S. his heir was admitted as heir of I. S. upon the preſentment of the homage, that I. S. died ſeiſed, and that the ſaid W. is his heir; and that at the ſame Court W. S. ſurrendered to the uſe of the Plantiff, and he was admitted, and it was argued by Richardſon for the Plantiff, and by Attoe for the Defendant. East. 21. Jac. C. P.

And theſe inſuing points were agreed by the Iuſtices, (S.) by Hobert, Winch, Hutton, and Iones; and firſt it was ſaid by Hobert, that though a Coppiholder may not convey his Coppihold to a ſtranger without Surrender and admittance; yet he may grant his eſtate to the Lord of the Mannor out of the Court by bargain and ſale, for the cuſtome is not between the Lord and his Tenants, but between themſelves only. Secondly, Winch ſaid, that the admittance of the Lord, viz. the leſſee of the Mannor amounts to a grant to him, who had a title, but it is otherwiſe, if it is to him who was in by wrong, as by diſſeiſin Coo. 4. 22. which was granted by all the Court. Thirdly, Iones Iuſtice ſaid, that the bargain is void, for it is of all lands, and Tenements bought of Iohn Culpepper, and it was not found by verdict, nor yet averred by the party, that the land was bought of Culpepper, which Hobert and Hutton granted: and Hutton cited 2. E. 4. 29. but Winch to the contrary, as to that point, but they all agreed that the Plantiff ſhall have judgement, and accordingly ſo it was done.

M. 21. *Iac.* in *C.* P.

Pleadal againſt *Goſmore.* *Poſt*, 124.

PLeadal, an Attorney of the Common pleas, brought an action of treſpas againſt Goſmore, and he declared of the taking of a Mare Colt in May, and of the retainer till the firſt of July, and that the Defendant held him in Compedibus, Anglice in fetters, diverſis vicibus & temporibus, by which the Colt was much the worſe: and the Defendant pleaded, that the Counteſs of Hartford was Tenant for life, of the Mannor of Sherſtone, within which the taking of the Colt is ſuppoſed to be, and that the Lords of the Mannor time before memory &c. had uſed to have eſtrayes, and uſed to ſeiſe them by their Bailiffs, and to proclaim them according to the Law of the land; and that the ſaid Mare Colt came within the Mannor ſuch a day, and the Defendant as Bailiff to the ſaid Counteſs ſeiſed that as an eſtray, and made proclamation according to the Law: and when the Mare Colt was ſo fierce and wild, that he could not tame that, nor keep that out of the lands of his neighbours, he Fettered her, as to him bene licuit, and he detained her till the firſt of July, at which day the Plantiff came to him and told him, that this was his Mare Colt, upon which the Defendant delivered her, which is the ſame Treſpas &c. and upon that the Plantiff demurred: and Attoe argued, that the plea was not good for matter of Law, for a man may not Fetter an eſtray Colt, as appears in the like caſe 27. Aſſiſes: and the reaſon is, becauſe ſatisfaction ſhall be given for his damages which he made to the Defendant: and he cited a caſe, adjudged in that point 8. Iac. Trin. between Harvey and Blacklock in this Court, where the Defendant pleaded ſuch plea in all points, as here as to the Fettering, for the Defendant fettered the horſe of the Plantiff; becauſe he was ſo fierce and ſo wild to one of his own horſes, and ſo continued till he delivered him to the Plantiff: and becauſe the horſe died within the year the Plantiff brought his action, and upon this plea pleaded by the Defendant, it was demur- J. Ro. Ab. 879. pl. 5. Hutt. 67. 3. D. 283. pl. 4. 5.

Mich. 21. *Jac.C.P.*

red in law; and judgement was given for him, for Cook who was then chief Iustice said, that a horse may be of 40. or 100. l. price, and it shall be intollerable to allow such Nusance; and secondly, he had not made proclamation, and so trespass lies against, and so in our case. Harris Serjeant to the contrary; for when the Lord of a Mannor takes an estate, he had some kinde of property before the year is expired: and for that reason he may detain the estray against the owner, till amends is made to him 44. E. 3. 14. 29. E. 3. 6. by Knevet 20. H. 7. by Vavasor, and Frewick; and if he had property against the owner himself, he may use that with moderation to make some benefit of that; especially in case of necessity, as 22. Assise 5. 6. a man may justifie the beating another if he be in a rage, and 6. E. 4. 8. one may justifie the felling of a tree in the ground of another in case of necessity; and here is no other way to restrain this Savage Colt, and so the justification is good, but in this case it was resolved by Hobert, Winch and Hutton, Iones being in the Chancery. First, when a beast comes within the Mannor of another Lord, this is a trespas, but after the seisure for an estray, it is a possession of the estray in the Lord, and the beginning of property; as Hutton used the term, so that he may have an action of trespass against any stranger, which takes that out of his possession: and if he estray into the land of another, he may him retake.

Secondly, it was resolved, that if the Lord make not proclamation in convenient time, that this possession became tortious, for the law necessarily imposeth it, upon the Lord of the Mannor, that he make Proclamation, because that otherwise the owner may not come to the knowledge of him. Thirdly, that the estray within the year is, as a pledge in the Custody of the law, till amends be made to the Lord: and for that reason the Lord may not work him no more, then he can work a distress. Fourthly, it was resolved that if the estray goe into the Mannor of another Lord, and the last Lord claims that as an estray, the first Lord had lost that, but not before claim. Fifthly, Hutton and Winch agree, that he might Fetter the Colt being so fierce, and wild, for he is answerable for the trespas and wrong which he makes in the land of his neighbours; and also to the owner if he lose him, and therefore it is unreasonable, that he may not keep him safe for his indempnity: and that is not like to the case 27. Assise, which was urged of the other side, also they said, fettering is the usual way in the Country to restrain wild horses: and therefore if it be in an ordinary manner, as he Fetters his own, there is not any remedy against the Defendant. Hobert chief Iustice, was against that last point, for the Lord may not hold him in arcta custodia as a prisoner; because he had rather the keeping of an estray, then the property, and for that if the estray go into the land of another Lord, the first may not take him again, if the other claims him as an estray, for the possession was, rather in regard of his Mannor, then in regard of himself, and therefore he shall not answer for the wrong, which he doth in the lands of others, for the possession is in regard of his Mannor: and this Fettering is an abuse, and he may not neither use nor abuse an estray, and he said over, that the Defendant had not well pleaded for another reason, because he had not shewed, that he proclaimed him in the next market Town within convenient time, which convenient time ought to be adjudged by the Court: and he said, the Lord may not keep him else where within the year then within the Mannor: Winch Iustice said, the Defendant ought to proclaim an estray, ut supra, if the year be past, for by that he gains an absolute propertie; but here where no property is devested, he needs not to proclaim him within the year: and Hobert commanded this case to be moved again: see the last case but one in the book.

Ruled that after imparlance in debt upon an obligation, the Defendant shall be admitted to plead alwayes ready, though the 13. Eliz. in Dyer was urged to the contrary.

Hillary

Hill. 21. *Jac. C. P.*

Hillary Term in 21 year *Iac. C. P.*

Trehern againſt *Claybrook*. *Ante 26.*

2. *Dan. 89. p. 12.*

TRehern brought an action of debt againſt Claybrook upon a leaſe for years, and upon nihil debet pleaded, and a ſpecial verdict, the caſe was to this effect; the Grandfather of the Plantiff was ſeiſed of lands in Southwark, and he made a leaſe for years of that to the Defendant at London rendring 45. l. rent, and after he deviſed the reverſion to the Plantiff in fee, and in his will he ſet forth that his intent was, that his Executors ſhall have the reverſion during the Term, upon condition that they enter into bond to pay 34. l. per annum at 4. uſual Feaſts during the Term; and he further deviſed, that this bond ſhall be made by the adviſe of his overſeers, and he limitted all this to be done within 6. moneths after his deceaſe, and if his Executors refuſe, his will was, that his overſeers ſhall take the profits upon the ſame condition; and appointed that both obligations be made to the Plantiff, and the deviſor died, and the Executors within 3. moneths ſhewed the will to the overſeers, but no obligation was offered to be made within the 6. moneths, and the Plantiff required the Executors to enter into the obligation, and to pay the rent, which was not done, and he claimed the reverſion, and brought his action afterwards in London where the leaſe was made, and not in Southwark where the land did lie, and this caſe was twice argued by Councel at the barre; and now it was argued by the 3. Juſtices. Hobert being abſent. 2. *Ro. Rep. 382. Hutt. 68. 1. Jon. 43.*

And Iones Juſtice moved a point, which was not moved at the barre viz. that the Plantiff is deviſee of the reverſion, and ſo is privie in eſtate only, and for that reaſon the action ought to be brought in Southwark where the land lies: and not in London where the contract was made; but the leſſor himſelf had liberty to bring the action where he pleaſed, in regard of the privitie of eſtate and contract: and ſo was it adjudged in the Kings Bench, between Glover and Humble: and here though this be after verdict, and no exception taken by the Defendant; yet we as Judges of the caſe may take notice of that ex officio, and give judgement againſt the Plantiff: and the 3. Juſtices agreed, that here is a condition, by which the reverſion is veſted in them, but it is in the Plantiff till performance of that, which not being performed by them within the time limitted, the Plantiff ought to have the rent: and though the Will is, that it ſhall be with the adviſe of the overſeers, and no adviſe is found; yet that is at the peril of the Executors, who ought to give notice of that to the overſeers, being to their advantage: and for that ſee 21. H. 6. 67. 46. E. 3. 5. 18. E. 3. 27. 11. H. 4. 13. which caſes were cited by Serjeant Harris at the barre; and they agreed, that the overſeers ſhall not have the reverſion, for though it was deviſed to them; yet that was upon the refuſal of the Executors, and no refuſal is found, but only a non performance of the condition: and alſo the deviſe is tied to them upon condition, to do that within 6. moneths, which ought to be performed in convenient time at the leaſt, though it be in caſe of a Will: and ſo they concluded, that the Plantiff had right as to the matter in Law; but that judgement ſhall be given againſt him upon the matter ſupra; and it was reſolved, that this was not aided by any Statute of Jeofailes, for this is a miſtrial: but another point was moved, whether the Plantiff ſhall pay coſts, within the Statute of the 23. H. 8 or 4. Iac. the words of the Statute are, if the Plantiff be nonſuite, or verdict given againſt him upon a lawful trial; but here it was reſolved, that he ſhould not pay coſts, for no verdict is found againſt the Plantiff; but rather for him: and judgement is given againſt him, becauſe he miſtook his action, and in Biſhops caſe Coo. 5. judgement was given againſt the Plantiff, upon a material variance in the verdict, and no coſts was given: and it is not only out of the letter of the Statute, but alſo out of the intent, for it may not be imagined, that the Plantiff had ſtirred an unlawful ſuite, when the matter

Hill. 21. *Jac. C. P.*

matter which he declares is found for him: and that Statute is not taken by equity, as Hutton ſaid, for it hath been agreed here, that if Executors are nonſuite, or judgement given againſt them upon a verdict, they ſhall not pay coſts, within the Statute of the 23. H. 8. or 4. Iac. and ſo is the conſtant practiſe, for the Statute ſpeaks of any contract or ſpecialty made with the Plantiff, or between the Plantiff and Defendant: and the Executor brings an action upon the contract of another: and in the principal caſe, judgement was entered, that the Defendant ſhould go without day: and that he ſhall not have coſts againſt the Plantiff.

Bret and *Ward*.

NOte upon evidence to a Jury, between Bret and ward upon the diſſolution of a Vicarage, in the County of Warwick, which was part of the Priory of Dantry, where the Pope by his Bull gave to the Vicar minutas decimas et alteragum: and it was certified by the Doctors, that alteragum will paſs to the Vicar Tithe wool &c. and the uſage was ſhewed in evidence, and the Copie of the Popes Bull; and the Court would not credit, that without ſeeing the Bull it ſelf, and ſo the Plantiff was nonſuite, and the Jury was diſcharged.

Bacon againſt *Weſton*.

BAcon brought an action of debt upon an obligation againſt Weſton, as an Adminiſtrator to one Okes: and he pleaded, that the ſaid Okes ſuch a day and year in his life time, acknowledged a judgement to him in the Kings Bench, upon an indebitatus eſt of 1500. l. and died, and that he retained ſo much of the goods to ſatisfie himſelf, and that over that 1500. l. he had put 40. s. and it was moved that he ought to plead the general iſſue, and give this matter in evidence as he may well: but it is a miſchief to the Plantiff, to take iſſue upon that, for then he ought to ſay, that he had aſſets. Hobert, true he may give this in evidence, or he may plead, that the judgement was not ſatisfied, or defeazanced: but we may not compel him to change his plea, except he will aſſent.

L. Dan: 143. pl. 17. S. C. 152. pl. 14. S. C. Cro. Jac. 687. S. C. Hutt: 72. S. C.

Potter againſt *Brown*. *Poſt* 89.

POtter brought an action upon the caſe againſt Brown for theſe words, he (innuendo the Plantiff) as is arrant a thief as any is in England, for he did break open the Trunck of the Plumbers, ſtanding in my Lord of Suffolks Hall with another mans tools, and took out 20. l. and upon a general iſſue, it was found for the Plantiff, and damages given to twenty pound: and Hendon Serjeant moved in arreſt of judgement. Firſt, becauſe for want of an averment, that there are Thiefs in England; and it had been adjudged, that if A. ſay of B. he is as arrant a Thief as any is in Warwick Goal; yet B. ought to aver, that there are Thieves in Warwick Goal: but it was holden by the Court viz. by Hutton, Winch, and Iones, that there needs not any ſuch averment: and the difference is, when the words do relate to a particular place, and when to an entire realm, and the ſame law when it is tied to one kinde of felony, for it is very well known, that there are Thieves in England, and any in other realm; and Hendon moved, that the laſt words extenuate the former, for the latter ſhew, that he took that as a treſpas, for he did not ſay that he ſtole 20. l. out, but took it out, and ſo it ſhall be intended, that he took it as a treſpaſſer: as to ſay B. is a Thief, for he took money out of my Pocket, implies a treſpaſs: and he is a thief, for he took my horſe; this ſhall be ſuppoſed that he took him as a treſpaſſer, and Hutton ſaid, that till the time of

Hen.

Hen. 8. there was not any actions brought for words, and to the end to ſettle peace, he thought words not to be taken ſo largely, and favorably in giving way to unruly tongues, and to the unbridled humours of men, but rather ſtrictly to curb them for their evil language: ſee after. East. 22. *Jac. C. P.*

Eaſter Term in the 22. year of King *James* in the *Common Pleas.*

Upon Wedneſday being the 25th. day of April, and the firſt day of this Eaſter Term, which was the firſt day which I came to Repoyt; and it was agreed by the Court the ſame day: that if one come to the Bar to make his law in debt, brought againſt him upon a ſimple contract, that the Plantiff ſhall be demanded, and if he will be nonſuit he may, and then the Defendant ſhall not recover coſts againſt him; but as I have heard that this was to have been intended where the Plantiff was an executor, or Adminiſtrator, and not of any other.

Leonard Barley againſt *Foſter.*

Between Leonard Barley Plantiff, and Foſter Defendant, it was agreed without ſcruple by Winch and Hutton Juſtices only preſent in the Court, that if a man infeoff another to the uſe of A. for life, and after his death to the uſe of his daughter, till B. pay her a 100. l. and then to other uſes &c. to the uſe of B. I. in this caſe the daughter had not any remedy for the 100. l. if B. will not pay that, except he make a new promiſe, and then upon that ſhe ſhall have an action upon the caſe, upon which if ſhee recover, and have ſatisfaction, the uſe will ariſe to B. but otherwiſe not, though ſhe have judgement to recover that, and whether this ſame is diſcharged, is triable by the record of the recovery.

John Theaker's caſe.

1. Ban. 727. p. 4. S. C. Cro. Jac. 685. S. C. Litt. 177.

Note that one Iohn Theaker was ſeiſed of certain lands, and died in January laſt, and his wife was married to one Duncombe within a week after, and one Alphonſus Theaker entered into the land, as Cozen and heir to Iohn Theaker deceaſed, and the wife of Iohn Theaker who was dead gave out words, that ſhe was with child, by her firſt husband, and upon that Alphonſus Theaker had a writ de ventre inſpiciendo, directed to the Sheriff of London, to inquire by 21. Knights and 12 women in the preſence of the Knights, whether ſhe was with child or no, and the Sheriff executed that, and returned that they thought that ſhe ſhould be brought to bed within 20. weeks, and upon that it was prayed, that the Court would award according to Bracton, that ſhe may be taken into cuſtody, and that ſhe may have divers women of faſhion which may attend her daily, till ſhe is delivered, that no deceit may be contrived againſt Alphonſus to deceive him, but the Court would not agree to that, though there was a preſident urged, Hill. 39. Eliz. Rot. 1200. Sir Percival Willoughby and the Lady Willoughby his brothers wife in this Court: but the Court awarded, that ſhe ſhould not be taken and detained from her husband, but that a writ ſhould iſſue to the Sheriff of Surrey, whither the woman was now removed to return divers ſufficient women which may reſort to her daily, till ſhe is delivered, which was done accordingly.

Foſter

East. 22. *Jac. C. P.*

Foſters caſe.

FOſter brought an action of debt of 300. l. againſt C. upon 2. obligations, dated 20. December to pay him 150. l. &c. and averred he had not paid that, and did not ſay, nor any part of that: and Bing took exception to that in arreſt of judgement, becauſe he had not averred, that he had not paid any part of that, and perchance he had paid part, but not all; but Hutton ſaid, that it is very good, though this be upon ſeveral bonds, and if any be paid, it ought to come of the other part to ſhew that. Woolſey was outlawed at the ſuit of Iones, in an action of debt upon an obligation, and the Capias ut legatum was taken out of the Court of the common pleas, where he was outlawed in Trinity Term 21. Iac. and in December following, Woolſey was warned to be at the Town of Shrewsbury to chuſe Burgeſſes: and before the day a binding proceſs, did iſſue out of the Marches of Wales againſt Woolſey, after Iones had delivered the Capias ut lagatum to the Sheriff to take Woolſey, and the ſame morning that the election was, Woolſey was taken upon the Capias ut lagatum, but he was ſuffered to go and to give his voice in the election, and then the Bailey of the Marches of Wales arreſted him upon the proceſs; and becauſe the Bailiffs of the Sheriff, would not ſuffer the Bailiffs of the Marches to take him away from them, there was gathered a great riotous companie on both ſides, but the Bailiffs of the Sheriff took him away, and they and all them, who took their parts were ſued in the Marches, for the withſtanding their Bailiffs, and upon this Harris moved for a Prohibition, and the Court &c. Winch and Iones ſaid, that if he is outlawed bona fide it ſhall be granted, for the Bailiffs of the Sheriff had lawfully arreſted him, and it is lawful for them to keep him, and for others to aſſiſt them; and Winch ſaid, that if the perſons which ſtood by, had refuſed to help them, this had been alſo finable, and it was ſaid, that the ſuffering him to go to the election, was not any ſigne of a fraudulent arreſt; nay, if the partie himſelf, had conſented to a fraudulent arreſt upon a Capias ut lagatum, this had not been puniſhable, though they had known that there had been binding Proceſs out againſt him, becauſe the arreſt & the detainer was lawful, and agreed in the principal caſe, that a Prohibition ſhall be granted; and it was ſaid, that the other ſide are puniſhable, becauſe they did not aide the Sheriff, for the officers of the other ſide were the cauſe of the Riot.

Sir *Michael Wharton*, and Sir *Edward Hide*.

IT was agreed without ſcruple, between Sir Michael Wharton and Sir Edward Hide, that if a man in an avoury convey a good eſtate for years to two, and one releaſe to another, that is not good, without the ſhewing of a deed in that caſe.

Michael Bone, and the Biſhop of *Norwich*.

IT was agreed between Michael Bone, and the Biſhop of Norwich in treſpas, that by the leaſe of a Grange, and all houſes and buildings thereupon, and belonging or let heretofore to one Edward Garrard; that in this caſe, if it may not be proved, that the Tithes were not let to Garrard, then they will not paſs by this leaſe, for it is not poſſible that Tithes ſhall paſs as appurtenances to a grange, becauſe

because that they are of several natures: except as Winch said, that the Grange is the Gleab; for if it is, then the Rectory may pass by this name. East. 22. Jac. C. B.

William Triſt, and *Cawtrel*, at the ſuit of *Heath*.

WIlliam Triſt and Cawtrel, were bound in an obligation of 40. l. to one Heath, who brought an action of debt upon that, and recovered at the assizes, and now it was moved in arrest of judgement, that this was a mistrial, for the venire facias was between Heath and Iohn Triſt, and the Sheriff returned, that to be between Heath and William Triſt; and for this variance he shall not have judgement in the Case.

Hutton said, in the case between *Mankleton* and *Allen*.

MAnkleton and Allen, that is a man had goods taken from him, which taking he supposeth to be felony, but it is not, and he complains to a Justice of peace of that, who commits the offender, and bindes the other to prosecute: and he accordingly preferred a Bill at the Sessions, and the other is acquitted; and the opinion of Hutton in this case was, that this is not punishable, by an action upon the case in the prosecuter, for that shall never be maintained without apparant malice in the prosecutor.

Blunt and his wife against *Hutchinſon*.

BLunt and his wife brought a quare Impedit against Hutchinson, and made title to present to the Church in the right of his wife, and after the issue joyned, and before the venire facias the wife died, and the Plantiff shewed, that himself had took out a venire facias in his own name, and upon that Harris demurred in law, because he supposed that the writ was abated; but Winch was of opinion, that the writ was not abated, because this was a Chattel vested in the husband during the life of the wife. 1. Dan. 705. pl. 6. S. C.

Ferrers against *Engliſh*.

IN an action upon the case, upon a promise between Ferrers and English, and upon non assumpsit it was found for the Plantiff, and now it was moved in arrest of judgement, that the venire facias was not well awarded, for it was præcipimus quod tibi venire facias Duodecim. liberos et Legales homines Coram Henrico Hobert apud Westmonasterium, where that ought to be Coram Iusticiariis nostris, and therefore the writ being insufficient it is not amendable, and for that he cited the case where the venire facias was awarded to th Coroner, and that ought to be awarded to the Sheriff, and this adjudged to be erroneous, this case was answered, that this was the custome, and there was a case alledged to be adjudged 30. Eliz. between Cesor and Story, where a Capias did issue out of this Court, in this form, Ita quod habeas Corpus ejus Coram Iusticiariis omitting apud Westmonasterium; and this was reversed for error; but this was answered to be in an original, which ought to be precise, in every point; but Serjeant Crook said, that because this was but judicial process, and the trial is Cro. Car. 19. Cro. Eliz. 104

East. 22. *Jac. C. P.*

taken upon the habeas corpus that it is amendable, for in all caſes where the roll is right, though there be an error in the venire facias; yet this is amendable.

Sir *Robert Nappers* caſe. *Poſt*, 87.

A Rent was granted to Sir Robert Napper, and if it happen that this annual rent to be behinde, that then the land ſhall at all times be open, and ſubject to diſtreſs of the Grantee, according to the true form and effect of the ſaid indenture; and upon all the pleading a demurrer was joyned, and the ſole doubt was, whether the laſt words were a diſtinct covenant by themſelves, for if they are, then the obligation is forfeit, for the lands are not open to diſtreſs, becauſe that the mother of *Sir* Robert held that till the age of 24. years, or whether they are part of the former covenant, and then the former words will qualifie that, becauſe there was not any act made by him to the contrary, and it was argued by Bawtrie, that they are all one covenant, for they charge the land with the Annuitie, and he covenants that this ſhall be open to diſtreſs, and it is all one matter and thing, and is therefore a covenant; and where one covenant doth depend upon another, there one expounds the other, ſo Dyer in Throgmortons caſe 151. and he urged many caſes which are cited there, and he cited the Lord Cromwels caſe, where words of proviſo are placed between words of covenants, yet they will work according to the intent of the perſons, and there it is ſaid, that ex antecedentibus et conſequentibus fiat relatio: and ſo it appears to him, that this referred to the eſtate which Sir Thomas had from his father, and that he made nothing to impeach or to alter that. and he cited the caſe of Sir Moile Finch, though by the fine the Mannor of Beamſtone was deſtroyed; yet in the ſaid indenture, free egreſs and regreſs was reſerved to the Courts for the Lady Finch: afterwards an other fine was levied of all the lands and Tenements, except the Mannor of Beamſtone, where in verity that was deſtroyed before, and yet the judges did conſtrue this to be a good exception, becauſe this was in verity the intent of the parties, and there they made a conſtruction upon the covenants, which did lead the fine, and upon the latter indenture which did direct the others, and ſo the principal caſe, in Althams caſe the judges did not only adjudge upon the firſt words of the leaſe, but upon altogether, and he cited the caſe of Hickmote where the exception extends to all the parties of the precedent deed: and Hendon argued to the contrary, that they were ſeveral covenants, and yet he granted, all the caſes cited by Bawtrie, but ſaid, they all ſtood upon this difference, where it is a joynt thing, and where it is a ſeveral thing as here, and for that reaſon, that ought not to be applied to that, for they are diſtinct ſentences, and not joynt, as is expreſſed in Sir Henry Finches caſe, Coo. 6. and they ought to be conſtrued as diſtinct covenants, for otherwiſe they ſhall not take effect at all, for then he had not any remedy. for the rent which is expreſly againſt the intentions of the parties, and Crawley Serjeant ſaid, that if the two firſt covenants were according to the title, and the laſt was only conditional, if the rent was behinde, that then it ſhould be open to diſtreſs, and the Court ſeemed that they were ſeveral covenants, but judgement was reſpited for that time; and the ſame Term, the caſe was moved again by Hendon, that they were diſtinct covenants, and that this was the ſcope of the indenture, and the intention of the parties, that this ſhould begin preſently, and ſecondly, the two covenants are of ſeveral natures, and if the third covenant be not ſeveral, then it is idle, for all is implied in the firſt, and day was further given to adviſe of that, but the opinion of the Court ſeemed to be for the Plantiff. See after Trin. 22. Iac.

Wheſtlie

East. 22. *Jac. C. P.*

Weſtlie againſt *King.*

VVEſtly againſt King in debt the bond did bear date the 11th. of February 18. Iac. and this was to perform an award, Ita quod the ward be made before Eaſter, of all controverſies depending between them in the Star chamber, and the Defendant pleaded, that there was no award made in the mean time, and the other ſhewed the award, and aſſigned the breach, and the Defendant replied, that before the award was made &c. upon the 16th. of March; they diſcharged the Arbitrators, and ſo concluded as at the firſt they made no award; and now Serjeant Davenport moved, that he had not maintained his bar, quod non fecerit tale arbitrium, and have given the diſcharge in evidence, for now it appears, that the bond is forfeit; but Hutton ſaid, that the Plantiff ought to have ſhewed this diſcharge, and ſo he had ſhewed the forfeiture, and he ſaid further, that the rejoynder is an affirmation of the bar, if they were diſcharged then they made no award, and this notwithſtanding ſhewed a forfeiture of the bond, but not upon the point which the Plantiff had alledged: and Winch ſaid, though this is ſo; yet it appears, that the Plantiff had cauſe of action by all the record before, and day was given over in the caſe; and at that day the Court was of opinion, that jud gement ſhall be given for the Plantiff, for by the rejoynder the Defendant had ſhewed, that he had forfeited the bond, though that be another matter then is in the replication: and ſo he ſhall have judgement, ſuper totam materiam according to the judgement in Francis Caſe Coo. 8. for their the declaration ſtood good, though the Plantiff had not cauſe of action in the ſame manner, yet becauſe it appeared, he had cauſe of action he ſhall have judgement.

Weaver againſt *Beſt.*

VVEaver againſt Beſt, in debt for 48. s. in the debet and detinet, and for 2. ſhirts in the detinet only, and he declared, that the Defendant ſuch a year retained the Plantiff to be his ſervant in husbandry, giving him 48. s. and a ſhirt by the year, and he ſhewed that he retained him for the next year, and he averred that he ſerved him, and they were at iſſue upon nihil debet, and the Plantiff had a verdict for him, and it was now moved in arreſt of judgement by Serjeant Brigman, becauſe he had not ſhewed that his retainer was according to the Statute of the 5th. of Eliz. which Statute limitteth the form of there retainer, and their wages, and other things. and he had not ſhewed the place where ſervice was, and alſo he had joyned two debts in one action, one in the debet, and detinet, the other in the detinet only; and Winch Iuſtice ſaid, that the Statute of the 5. Eliz. extends to ſuch as are retained in husbandry, and therefore other retainers are left as they were before the Statute at the Common law, and this ſhall be intended to be a retainer according to the Statute, if the contrary be not ſhewed by the other partie, for his retainer was for a year, and therefore it ſhall be intended, that the wages was appointed by the Iuſtices, and it was alſo ſaid by the Court, that if the juſtices of the peace in this kinde, do neglect to ſet down the wages, yet a ſervant may bring an Action upon his own contract; alſo it was ſaid, that he needs not to ſhew the place where he ſerved, for if he did no ſervice; yet if he did not depart it is very good; and for the other matter it was clear, that he may bring his Action, ſo by ſeveral precipes in one writ.

East. 22. *Jac.C.P.*

Thornes caſe.

IT was agreed clearly between Thorn and C. that where an obligation is made, and the obligor, and the obligee, conferred about it, and the obligor ſaid to the obligee, that he had forged this, this is actionable, for here it refers to a certainty, but if he had ſaid to the other thus, he was a forger, and had forged falſ writings no action will lie, for the words are to general in that caſe, alſo it was agreed clearly by the Court, the Sheriff may not arreſt a man upon a Capias after the time of the return of the writ.

Graſier againſt *Wheeler.*

Graſier as Executor brought an action of Covenant againſt Wheeler, upon a leaſe made by the Teſtator rendring rent, and this was made by I. S. and the Defendant covenanted, that the leſſee ſhould pay the rent, and the Plantiff aſſigned the breach in non-payment of 30. l. to the Teſtator ſuch a day when it was due, and for 10. l. due in his own time, and the attorney of the Defendants as to the 10. l. pleaded non ſum informatus, and as to the other he pleaded, that the Defendant paid to the Teſtator 7. l. in money, and a horſe in full ſatisfaction of all the ſaid 30. l, and that the Teſtator accepted that in full ſatisfaction, and the Plantiff ſaid, that this was paid to the Teſtator for another debt abſque hoc, that he received that in ſatisfaction of the 30. l. and now Devenport argued, that the iſſue was miſjoyned, for the iſſue ought to have been taken upon the payment, and not upon the acceptance; and he cited Pinnels caſe Coo. 5. where the payment in full ſatisfaction ought to be pleaded preciſely; and he ſaid, that he agreed to the caſe of Nichols Coo. 5. where the iſſue was joyned upon payment upon a ſingle Bill, and found that this was not paid, and the Plantiff had judgement; but if the iſſue had been found for the Defendant, that had not been aided by the Statute, for though it had been paid; yet that was no bar. Bridgman contrary: and he ſaid the difference is, where the iſſue is joyned upon a matter alledged by the adverſe partie, and they are at iſſue upon a point which is not material, that is aided by the Statute of the 18. Eliz. and where no iſſue at all is joyned there is not any help. Winch Iuſtice ſaid, that this is an iſſue which will make an end of the matter,

And at another day this Tearm, Serjeant Harvey moved the caſe again in arreſt of judgement, becauſe the iſſue is joyned upon the acceptance, which is not material; and he cited Fowkes caſe depending in this Court, debt upon an obligation, and the Defendant pleaded the acceptance of another obligation in ſatisfaction which in verity is no bar, and iſſue was taken upon that, and it was doubted whether this being inſufficient, be aided by the Statute or not. Bridgman Serjeant ſaid to the contrary, and he ſaid as before, that becauſe the iſſue is taken upon the allegation of the Defendant if it is not good; yet it is aided by the Statute of 32. H. 8. and Hutton ſaid this is a full iſſue, and as to the traverſe ſaid, it is a material iſſue, for he pleaded, that he accepted them for another thing abſque hoc; that he accepted them in ſatisfaction of the 30. l. which is the moſt proper iſſue, for he ſaid it is clear, that he may ſay that he accepted them for part &c. and good, and ſo here.

The

East. 22. *Jac. C. P.*

The Counteſs of *Barkſhire*, and Sir *Peter Vanlore* in Dower.

IT was agreed clearly in Dower, between the Counteſs of Barkſhire and Sir Peter Vanlore, that if the Tenant plead never ſeiſed to have Dower, and in verity the husband of the demandant had an eſtate, but that was by diſſeiſin, which is avouched by the entrie of the deſeiſſee, who had a title paramount this is no title, by which he may have Dower, though they are at iſſue upon this plea, and alſo it was agreed, that if a man had a good eſtate by bargain and ſale from him who had right to alien that, and yet after he accepts a fine upon conuſance of right as that &c. from the other partie, though in this caſe this be a concluſion to the parties between whom the fine was, to denie that the land was of the gift of the Conuſor, and ſo that he was ſeiſed; yet it is not any concluſion to the jurors to finde the verity of the matter in fact, and that he had nothing of the gift of the Conuſor; alſo it was agreed in that caſe, if a man held lands in capite, and others in Soccage, and he made a deviſe of all his fee ſimple lands, and left only his lands in tail to deſcend to the heir which doth not amount to a full third part, this is a good deviſe of all the fee ſimple lands: and this caſe was alſo admitted, that where the Lord Norrice gave land to Sir Edward Norrice his youngeſt ſon, and to the heirs of the bodie of the father, and then the Lord Norrice died, and after Sir Edward died without iſſue, that the ſon of the eldeſt Brother who was then dead, ſhall take that as heir in tail, and that he in this caſe had that by a deſcent from Sir Edward Norrice his Uncle, which alſo doth clearly prove, that in this Sir Edward Norrice ſon of the Lord Norrice was in this caſe Tenant in tail.

The reſidue of Eaſter Term in the two and twenty year of King *James*.

Stephens and *Randal*.

IN replevin between Stephens and Randal, who made Conuſance as Bailiff to the Earl of Bath, and he ſhewed that ſuch land was parcel of ſuch a Chantrey, which came to King Edward 6. by the Statute of 1. Edward 6. and alſo he pleaded the ſaving of the ſaid Statute, by which the right of others was ſaved, and pleaded all incertain, and ſhewed that ſo much rent was behinde, upon which he made Conuſance as &c. to which the Plaintiff replied, that the land is out of the fee and ſignioric of the Earl of Bath &c. and this was ruled to be no plea, for he confeſſed ſo much in his avoury, and this avoury is not for rent ſervice, for the ſignioric is extinct by act of Parliament; but this is for rent reſerved by the saving of the act of Parliament, and this is a rent ſeck, and yet is diſtrainable for the privilege which was before, but he may traverſe the tenure, that at the time of the making of the Statute, nor never after this was holden of the ſaid Earl of Bath.

Prieſt and *King*.

PRieſt and King in an action of——which was entered between them Trin. 21 Iac. Rot. 3595. and this was debated between the Judges and the Prothonotaries, and the caſe was, that two were bound for the appearance of an other, and judgement was given againſt the debtor, now if upon the capias he come and offer

East. 22. *Jac. C. P.*

offer his bodie, and the Plantiff refuſe that, yet that diſcharges the ſureties; but the Prothonotaries ſaid, that notwithſtanding this refuſal he may take a Capias againſt him within the year, becauſe that at the firſt he might have had a fierie facias, or an elegit quere of that; but Winch thought that in this caſe, he ought to have a fierie facias, but if he had come upon the Capias, and had no ſureties and he refuſed to take him, and this is ſo entred now quere, if he had not diſcharged him.

Hendon moved the Court for a prohibition to the ſpiritual Court, and ſuggeſted that one had libeld in the ſpiritual Court for a legacie, and the Executor ſhewed that he had not aſſets to diſcharge the debts of the Teſtator, and that Court would not allow this allegation, and upon this he prayed to have a prohibition: and it was the opinion of the Court, that no prohibition ſhall be granted, for the legacie is a thing meerly which is determinable in the ſpiritual Court, and no other Court may have Conuſance of that, and this is alſo a thing which doth conſiſt meerly in the diſcretion of the Court; and reſolved that in a thing which meerly doth reſt in diſcretion of the Court, in this caſe no prohibition ſhall be granted.

Henry Good againſt *Thomas Good.*

IT was agreed in the caſe by the Court, between Henry Good and Thomas Good, that if the deviſee of 500. l. ſue in the Marches of Wales for this legacie, that a prohibition is grantable, for though the Court of the Common pleas had no power to hold plea of that, yet becauſe that the thing is only triable in the Eccleſiaſtical Court, a prohibition may be granted to reduce that to its proper Court: and though the inſtruction of the Court of the Marches be to hold plea of all ſuch things, wherſoever there is no remedie at the Common Law, yet this is to be underſtood of matters of equitie, and not to take the juriſdiction from the ſpiritual Court, for in verity the King may not do that by his Letters pattents; but yet the Court agreed, that if the Executor do ſuffer a decree againſt him in the Court of the Marches, and not come to them at the firſt to be relieved, it is now meerly in the diſcretion of the Court whether they will grant that or no, for that is a means to lengthen ſuits, and to make the more delay, before he do recover his legacie.

If a Capias ut legatum iſſueth to the Sheriff to take the partie, and to enquire what lands and Tenements he had, and the Sheriff findes by inquiſition that he is ſeiſed of many lands, and continues poſſeſſion in them, and the Sheriff do out me, I ſhall have an action of treſpaſs.

John Marriots caſe.

SErjeant Crawley moved this caſe in arreſt of judgement in the caſe of Iohn Marriot, and he declared upon a contract, to table with the Plantiff at Aſhton in Northamptonſhire, & ad tunc & ibidem ſuperſe aſſumpſit to pay 4. s. by the week for his diet; and Crawley moved, that this ought to have bin tried in Northamptonſhire, for theſe words ad tunc et ibident refer to Northamptonſhire which was next before, and not to London: Hutton ſaid, that it ought to refer to London, otherwiſe it was idle, and it is to be intended of the time and the place where the promiſe was made, but it was ſaid if the iſſue had been, whether he was tabled or no this ſhall be tried there.

Giles

Giles Bray againſt Sir *Paul Tracie*. *Poſt*, 86.

East. 22. *Jac. C. P.*

Gilles Bray brought an action of waſte againſt Sir Paul Tracie, and in his declaration he conveyed a good tearm to the Defendant, and a reverſion to himſelf; and upon a general iſſue a ſpecial verdict was found to this effect: that Sir Edmund Bray was ſeiſed of this land in his demeaſne as of fee, and he being ſo ſeiſed 16. Eliz. made this leaſe for divers years to I. S. and he being ſo ſeiſed of the reverſion conveyed that to the uſe of himſelf for life without impeachment of waſte, and then to the uſe of Edward Bray his eldeſt ſon, and to Dorothie his wife, and to the heirs males of the ſaid Edward, upon the ſaid Dorothie to be ingendred, and then Edward died having iſſue in tail the Plantiff, and then this leaſe was aſſigned to Tracie, and then Dorothie died, and then the waſte was committed, and then Edmund the Grandfather died, and the queſtion was, whether in this caſe an action of waſte will lie or no. *Cro. Jac. 685. 1. Jon. 51. 8. C.*

The argument of Serjeant *Harris*.

HArris argued, that the waſte doth lie, for the privilege or diſpenſation, which was annexed to the reverſion, for life of the Grandfather is no diſpenſation to the eſtate of the leſſee, for though the action was ſuſpended during his life; yet now it is on foot again, and in many caſes an eſtate may be diſpunishable of waſte, and yet by matter ex poſt facto this ſhall be punishable, viz. where the firſt privitie of the eſtate was determined, as in caſe a leaſe for years be without impeachment of waſte, and then the leſſor releaſes to the leſſee &c. the firſt privity is gone, and he is now punishable in an action of waſte, and here in our caſe there was no abſolute diſpenſation, but only for the time, and yet perchance though the eſtate is ſubject to waſte in the creation, yet if the leſſor will afterwards, by his deed grant that this ſhall be diſpunishable, this may privilege him, but here is no ſuch matter in the caſe at the bar, and of this opinion was the Court, and Winch ſaid, that there was no difference where the Franktenement is intercedent; for if this be not punishable, yet the particular eſtate ſhall not participate of that privilege of him in the remainder: and Iones Iuſtice ſaid, if the particular eſtate had been extracted, and drawn out of that eſtate for life, in that caſe that had been diſpunishable; but it was agreed by Hendon Serjeant, that the Plaintiff in his declaration had declared of a waſte after the eſtate for life was determined, and they found that this was made in the time of him in reverſion for life, and ſo differed, but the Court was of opinion, that this was nothing to the purpoſe, for it is only a variance from the time, and not from the matter, for it is not material whether this was before his death or after his death, becauſe in both caſes this is punishable, but day was given over to ſhew other cauſes.

Portington and *Beamount*.

IT was argued clearly in the caſe, between Portington and Beamount, that if the Court of the Councel of York, which is a Court of equitie, do decree againſt a maxime in law, as againſt a joynt Tenant who had that by Survivorſhip, that the heir of his companion ſhall have the Moietie, that in this caſe a prohibition ſhall be granted, except that during the lives of the parties, it was agreed that there ſhall not be any Survivorſhip, and then they hold plea upon that equitie, and then good.

In

2. Dan. 558. p. 7. East. 22. Jac. C. P.

In Dower it was agreed clearly, that if the Tenant ſhew, that before the husband any thing had in the land, A. was ſeiſed of the ſame land in fee, and let that for years rendring rent, and granted the reverſion to the husband of the Plantiff, who died ſeiſed of the ſaid reverſion, and ſo demanded judgement, if the demandant ſhall have Dower &c. this is no plea in bar of Dower, but proves ſhe had title of Dower, but this ſaves the leaſe for years, and ſhe ſhall have judgement only of the reverſion, and of the rent: and alſo ſhe doth ſave to the Tenant damages, and the demandant ſhall be indowed of the reverſion.

Summers againſt *Dugs*.

1 Dan: 60. p. 76. S. C.

Summers brought an action upon the caſe upon a promiſe againſt Dugs, and he ſhewed in his declaration, that the Defendant was rector of the Rectorie of D. and that he and all his predeceſſors had uſed to have all manner of Tithes, and ſaid that he the Plantiff occupied 100. acres of land in the ſame pariſh, and ſhewed that the Defendant promiſed to the Plantiff, that in conſideration that he would plant his lands with Hops, and ſo make the Tithes to be the better, the Defendant promiſed to the Plantiff to allow him towards every acre, which he ſhall ſo plant 40. s. towards the charge in planting them: and he ſhewed that he planted an acre at the requeſt of the Defendant, and ſo upon the promiſe brought the action, and now it was moved whether this was a good conſideration to ground an action, becauſe the Tithes are not bettered by the planting of that with Hops, but by the growing of them, and the increaſe of them; and he had not averred, that the Tithes were of better value then they were before: and it was alſo moved, that he may not have an action for the Rood &c. but this afterwards was referred to Arbitrement; but the Court ſaid, if the Plantiff had ſhewed in his declaration, that he might have made more benefit of that by other means, then that by the planting of it with Hops, the Tithes alſo being bettered, then it had been more cleare.

Philip Holman againſt *Tuke*.

2. Dan. 502. p. 5. Co. Jac. 685. S. C.

Phillip Holman was executor of George Holman, and he brought an action of debt againſt George Tuke, and declared upon a leaſe made by himſelf by the name of Philip Holman executor of the Teſtament of George Holman deceaſed of ſuch land, and the ſaid land was delivered to him in execution of a Statute by extent, which Statute was made to this Teſtator, and this leaſe was for years, if the Plantiff ſhould ſo long continue ſeiſed by force of the Statute, and it was rendring 100. l. per annum and for 3. years rent behinde, he brought his action in the debet and in the detinet, and alſo in the declaration he averred, that he did continue ſeiſed ſo long by vertue of the extent, and Serjeant Bing demurred in law, becauſe he ſaid the action ought to be brought in the detinet only; becauſe he had brought the action as executor; but Hendon and the Court &c. Iones and Hutton to the contrary, becauſe the leaſe was made by himſelf, and Hutton ſaid in the caſe there is difference between a perſonal contract, and real, and it was ſaid, that an executor ſhall never be forced to bring his action in the detinet only, where he need not name himſelf to be an executor: which note well.

2. Dan. 502. p. 1. 8. Co. 31. b. S. P.

It was agreed in a caſe by Hobert, that where a man brought an action de parco facto and declared upon the breach of a pound, and alſo of the taking out of beaſts; and the Defendant as to the taking out of the beaſts, pleaded not guilty, and as to the breaking of the pound, he ſaid that he was Lord of the Soil, upon which the pound ſtood, and that he brake of the Lock, and put a lock of his own;

and

and Hobert ſaid in this caſe, that he ought to plead the general iſſue, for in verity this is not any breach of the pound, except the beaſt come out of it: and Iones Iuſtice was of an opinion, that if he put out the beaſts he may not have this action, becauſe the freehold was in him, but he ought to have a ſpecial action upon the caſe. East. 22. Jac. C. B.

Entred in Eaſter Term in the 19th. year of King *James* Rot. 1672.

Ellen Goldingham againſt Sir *John Saunds*. Poſt, 88.

ELlen Goldingham brought an action of Dower againſt Sir Iohn Saunds, to be indowed of the third part of the Mannor of Goldingham, and he vouched the ſon to warranty, as ſon and heir to Chriſtopher Goldingham, husband of the demandant, who appeared, and entred into warranty freely, and he pleaded that he had nothing by deſcent from Chriſtopher Goldingham his father, upon which plea the Tenant and the vouchee were at iſſue, and the demandant had judgement againſt the Tenant to recover, but ceſſet executio until the voucher is determined: and after that, and before the day of the niſi prius Edward Goldingham died, and then at the day the Tenant loſt by default, ſo is the Record, and now upon the prayer of the demandant to have a writ of ſeiſin, theſe caſes were moved. 2. D. 671. pl. 2. Cro. Jac. 688. Hutt. 71. Brid. 56

Firſt, by Serjeant Hendon, that the writ of ſeiſin may be ſtayed, becauſe as he ſaid, the Tenant may revouch the heir of the heir, for it is not poſſible, that the vouchee ſhould loſe by default, becauſe that he was dead, and therefore you may ſee, that he conceived, that where it is ſaid in the Record viz. on the back of the roſtea, that the Tenant loſt by default, he conceived that to be meant of the vouchee, and not of the Tenant in the writ of Dower: but Hutton was of opinion, that admitting that it ſhould be ſo intended, yet he may revouch, for there was a judgement given againſt him with a ceſſet executio till the voucher is determined; and that is now determined by his death, and when judgement is once given he had not day in Court; but if the vouchee had died after the warranty, then he may revouch; but here the Court rather intended, that the record ſhall be meant that the Tenant in the writ of Dower made default, and then it is not poſſible, that ever he ſhall revouch, but they ſaid, it had been more queſtion if the Tenant had appeared at the day of the niſi prius, and had pleaded the death of the vouchee after the laſt continuance, and had prayed the advantage of his warranty: and at another day Hendon moved, that the judgement given againſt the Tenant was not good, for it was abſolute with a ceſſet executio, where that ought to be a conditional judgement &c. againſt the Tenant if the vouchee had not aſſets, and if he had, then judgement againſt him according to the Lord Dyer 202. Mich. 3. Ma. Rot. 508. for otherwiſe the Tenant ſhall loſe the benefit of his warrantie againſt the voucher, and ſo if the heir do confeſs the aſſets, yet the judgement ſhall be conditional, for otherwiſe if he had not aſſets according to his confeſſion, the demandant ſhall have a new judgement againſt the Tenant, and of this opinion was Iones Iuſtice.

But Hutton ſaid, that this was very well, and that the judgement may be either wayes conditional, or abſolute, and he ſaid, that this is no prejudice to the warranty, for the Tenant may have a ſcire facias againſt the vouchee; but in this caſe day was given over till the next Term; and the Prothonotaries were commanded to ſearch the preſidents concerning that. See more after.

East. 22. *Jac. C. P.*

Mary Over and her ſecond husband againſt *Tucker*.

MAry Over and her ſecond husband brought an action of Dower againſt one Tucker, and demanded Dower of the indowment, of one Paul her firſt husband, and it was agreed, that this trial ought to be by witneſſes according to Dyer 155. and it was awarded by the Court, that the the Councel of either ſide ſhould draw up Interrogatories, and put their neam nto them, and then they ſhould be delivered to Maſter Walker the Prothonotary, in whoſe office the cauſe is entred, and he ſhall have the examination of the witneſſes of both ſides, and then ſeal up the Interrogatories again, and ſo remain till they were delivered over to the Court, and then qui melius probat melius habet.

The reſidue of Eaſter Term in the two and twentieth year of King *James* in *C. P.*

AN action of debt was was brought againſt an Executor, who pleaded plene Adminiſtravit, and the other replied and ſhewed that before this action brought, he brought another action againſt the Defendant in which he was outlawed, and that after the reverſal of the outlawrie he took out this writ &c. and that he had aſſets at the firſt bringing of the firſt writ, and iſſue was taken upon that, and it was found for the Plaintiff, and it was reſolved that the Plaintiff ſhall have judgement, for this is in nature of Journeys accompts according as it was in Aldridges caſe upon the ſame matter, which was long debated by the Court, and it was alſo affirmed to be good law, in a writ of error brought of that in the Kings Bench, for otherwiſe if it ſhould not be ſo, the Defendant himſelf ſhould take an advantage of his own evil plea, which the law will not allow by any means to be ſuffered, but then it was ſaid by the Court, that in this caſe, the Plaintiff in the action ought to bring his ſecond writ immediately after the reverſal of the firſt judgement in the outlawry, if he will take any advantage of that.

Trinity Term in the two and twentieth year of King *James* in the *Common Pleas*.

J. C. K. 28.

HIckford brought an audita querela againſt Machin, and the caſe in effect was this, Richard Davis 43. Eliz. acknowledged a Statute Merchant of 500. l. before the Maior and Clark of Glouceſter to Machin, and all the circumſtances of the Statute de mercatoribus were well obſerved, ſaving only that no day of payment was mentioned, and after the ſaid Machin took a leaſe for years of part of the land, of which the Conuſor was ſeiſed, and after the Conuſor died inteſtate, and Hickford took out letters of Adminiſtration, and Machin ſued execution againſt the ſaid Hickford who brought an audita querela: and the ſingle point was, whether this Statute be good, in regard that no day of payment is appointed, and after divers arguments by the Serjeants in other Terms, this Term it was argued by all the Court, and the effect of their ſeveral arguments were in this manner.

Ioues Iuſtice began and ſaid, it ſeems to me that the Statute is good, and that no

no audita querela will lie, and he ſaid here had been 3. objections made againſt this Statute; firſt, that every Act of Parliament which gives directions for the doing of a thing, ought to be preciſely purſued, and ſhall not have an explanation upon an explanation, and he ſaid, that notwithſtanding this objection, he thought the Statute to be good, for in every Act of Parliament there is ſubſtance, and there is form, and if the ſubſtance be obſerved, though not every circumſtance, yet that is very good, and ſo is the caſe concerning conditions, which are as ſtrictly to be obſerved as any thing, yet if the ſubſtance be obſerved, though not the very letter, yet this is very good; as the caſe of Scroop, one Covenanted to ſtand ſeiſed, to devile uſes with a proviſee, that if he ſhall be diſpoſed to alter, diſanul, or change the uſes &c. that then it ſhall be lawful, at all times at his pleaſure to do this by his writing indented, under his hand ſubſcribed in the preſence of 3. witneſſes to diſanul them, and alſo by the ſame writing to determine and ſet down other uſes; now if by indenture in the preſence of three witneſſes, he do covenant with another to ſtand ſeiſed to other uſes &c. here though there is no expreſs determination of the former uſes according to the words; yet the limitation of the new uſes do implie a determination of the former uſes, and ſo the ſubſtance of the words obſerved, though not the very litteral expreſſion: and ſo was it lately reſolved in this Court between Kenet and Lee, that where ſuch covenants were with power of revocation in his life time ſealed and delivered, now if in this caſe this be done by Will ſealed, this is a ſufficient revocation, for the intent was ſatisfied, and if in this caſe, then by the ſame reaſon in our caſe; but now let us come to this Statute, and in this Statute there are matters of ſubſtance, and matters of circumſtance; and the Statute of Acton Burnel ſaith, that the debtor ſhall come before the Maior to acknowledge that, now this is but a circumſtance of the Statute, for if the Maior come before him, this is very good, for the ſubſtance is, that the Statute muſt be acknowledged before the Maior in proper perſon, and not by Attorney, and alſo the Statute ſaith, that the recognizance be entred into the Roll with the hand of the Clark, here the inrolment is the ſubſtance, and not the writing, and ſo the Statute de mercatoribus is, that he ought to come before the chief Officer of the Citie &c. and yet it hath been ruled here, that if the Citie be governed by 2. chief officers, he ought to come before them both, for to this purpoſe they are but one: nay, the Statute is, that he ſhall be a Merchant who ſhall acknowledge that, and yet if he be not a Merchant, he is within the compaſs of the Statute to be a Conuſor; but now to the point, whether this is ſubſtance or circumſtance, and I am of opinion, that though the day of payment is not expreſſed, yet it is very well, for a day may be in that, and yet not be good, as if it be at Michaelmas after I. S. ſhall come to Pauls, now in this caſe, becauſe it may not appear to the Maior Judicially when to award execution, therefore it is not good; but if this be to pay the firſt return of Michaelmas Term, this is very good, for there he may know immediately when to award execution, and the ſame law if it be to pay before Michaelmas next, or to pay preſently, as an obligation, and ſo the Maior is bound to take notice, that this is to be paid preſently.

Trin. 22. *Jac.* C. B.

Cook. 10.

Another objection that it ſhall be frivolous, that his bodie ſhall be taken ſo ſoon as it is acknowledged, but I anſwer, that this may be very well, for this is for the ſecuritie of the Merchant who is the Conuſee, and Merchants ſhall not be ſuppoſed to know when tendring may be, in regard, that they are ſuppoſed to be men of forreigne imploment, and ſo upon the Statute of Bankrupts, for the words of the Statute are, to every creditor a portion is allotted to him; by your conſtruction the ſale ſhall be void, becauſe it is not according to the words of the Statute, but you ſee that this is ruled to be againſt you.

The third objection is explanatorie to the Statute of Acton Burnel; and for that it ought to be preciſely peruſed and not to varie from that, but I anſwer to that, that the Statute de mercatoribus it ſelf had not been obſerved in every point and circumſtance, for the words of the Statute are, that if the debtor do not pay

Trin. 22. *Jac.C.P.*

at the day, that then the debtee may come before the Maior and ſue execution, and yet it was reſolved Coo. 2. 48. that the executors of the Merchant may come; and beſides the words of the Statute are, that the extent ſhall be of all his lands, which were in the hands of the debtor at the time of the Statute acknowledged, and yet if he who is the Conuſor purchaſe lands afterwards; yet they ſhall be liable to be extended by force of the ſame Statute, though not made mention of, and ſo it is out of the words of the ſame Statute; and ſo I am of opinion, that the Statute is good, and that in this caſe no audita querela lies.

The argument of *Juſtice Hutton*

HUtton contrary, I am of opinion, that this Statute is void, and that the audita querela well lies in this caſe, and all my argument ſhall be upon the Statute Acton, Burnel, for this is the fundamental Statute, and I conceive that the intent of the law is, to contain a certainty when the money ſhall be paid; and the concluſion of the Statute de mercatoribus goes over, and further then the Statute of Acton Burnel, for this doth extend to all the ſubjects of the Kings, (Jews only excepted) and there is a reſervation, that this ſhall not deſtroy the action of debt, and alſo there is a reſervation to the Judges, that they may take a recognizance as before, and this Statute of Acton Burnel was made the 12th. Edw. 1. and there are in that Statute ſeveral eſſential points, which of neceſſitie ought to be obſerved, and firſt that this ought to be taken before an officer, and yet two officers which are the chief officers may well do this, for to this intent they are but one. Secondly, there ought to be a ſeal of the partie. Thirdly, a day of the payment ought to be alſo expreſſed, becauſe the ſecurity is taken before an ignorant man. Fourthly, the ſeal of the King ought to be to that: and fifthly, this ought to be inrolled: and it hath been alſo agreed to my hand, that a conjectural day of payment is not good, as at Mich. after the return of ſuch a one from Rome, or after the accompliſhment of the age of 27. years, for thoſe ſhall never be dayes to give juriſdiction, though they are good by way of contract: and ſuch a recognizance is good, for any thing for which an action of debt will lie, but if no action of debt will lie in this caſe, then it is not good; and ſo is alſo the Statute of 23. H. 8. cap. 6. for it doth not extend to ſuch things; but where an action of debt lies.

Acton Burnel explained.

And the firſt part of the Statute is, that the debt and the day of payment be entred in the roll, that ſo it may appear whether the day be paſt or no, and that may not appear by the judgement of the law, but upon the face of the Statute, and there is alſo one clauſe in the Statute, that if the debtor will ſay, that his goods were delivered, or ſold for leſs then they were worth the partie had no remedy, for when the Sheriff had ſold them, the debtor may accompt it his follie, that he ſold them not before the day of the ſuit; but if in our caſe, the money is payable preſently, he had then no time to ſell them, for certainly the meaning of the Statute was, in this to give time to the Conuſor to alien, and to ſell his goods; and ſo of a recognizance taken before the chief Juſtice, upon the Statute of the 23. H. 8. without queſtion a day ought to be limitted when that ſhall be paid, and there ought to be the ſeal of the partie, and the ſeal of the King, and the day of the payment ſpecified, and my firſt reaſon wherefore this Statute is void, is becauſe when an act of Parliament limits juriſdiction or power to any inferiour man, he ought to purſue his limitted juriſdiction preciſely in all the ſubſtantial points: as the Statute of Magna Charta limits, that he ſhall hold his turn viz. the Sheriff within one month after Michaelmas or Eaſter, now if he hold that but 2. dayes after it is void.

And the reaſon is, he ought to purſue this limitted juriſdiction, and then what difference is between theſe ſeveral juriſdictions, and I cannot compare that to a better caſe, then to Neufages caſe upon the Statute of the 23. H. 6. if the Sheriff

Cook 10.

do take an obligation for an appearance, if it do not appear in the condition, when the day of appearance is, then this obligation is void, for the day of appearance ought to appear expressly; and not to leave this to the construction of the law, and then what difference is there between our case: indeed contracts may be many times made good by reference, but so may not a Recognizance; and yet 17. Edw. 4. a man made a contract to give so much for Corn when he saw that, and the contract by the Justices was awarded void, because that no day was set when that should be paid, and see the book which is, I conceive that if the contract had been to pay, when he took the Corn it had been good, and so here if a man had such a jurisdiction, he ought to pursue that precisely; and for that the day in all those cases ought to be observed, and a fortiori in our case: and an other reason is out of the presidents in all times, and though there may be some few which doth pass, sub silentio yet I do not value them according to Slades case: and 5. Edw. 4. and all the subsequent Statutes since the Statute of Acton Burnel, are but declarations, and additions to this Statute, and as Grants case upon the Statute of 32. H. 8. nay that is not only a Statute of explanation, but is also an original Statute, but the Statute of 34. H. 8. of Wills is meerly a Statute of explanation, and for that reason in Buckler and Bakers case is, that Act to be construed precisely according to the word, and no new interpretation may be made of that; and for an answer to that which my brother Jones said, that here is a day equivolent to an expres day, for it is implied in law to be paid presently, according to the case of an obligation; but I say, that in this case there is a diversitie in our books, in the case of an obligation, 14. Edw. 4. 14. H. 8. 29. and other books, whether this is payable presently or upon request, and therefore in a case so dubious it is not fit to make an ignorant Maior to judge another case, by the rule of this case being so dubious, and so doubtful, for if in this case it be not payable without a request, then this is matter of fact, and not triable before him, nay the Statute de mercatoribus it self appoints that the day be mentioned, and so both the Statutes do mention, that there ought to be a day of payment appointed and fixed in the Statute, and then wherefore shall we make construction, that an implyed day will so serve the turn; and in the Statute de mercatoribus the form of the writ is set down, which doth expresly mention a day, and so I think there is not any doubt, but that if it were a Recognisance upon the Statute of of 23. H. 8. for default of day it shall be void: and so in our case, and so he said the audita querela lies well.

Trin. 22. Jac. C. P.

Cook 4.

Cook 3.

The argument of *Justice Winch.*

WInch to the contrary, and because the effect of his argument was to the same purpose, with that of justice Jones, and of the Lord Hobert, I will report that but briefly: and he said, that he held this to be within the Maiors jurisdiction, for the purpose and the intent of this Statute is, to give securitie to the Merchant creditor, and for that reason the day is not material; but I will insist upon two things veritatem facti, and considerationem legis, here is a good contract, and for that it ought to be paid presently, and if there had been no other matter but this, that it had been payable at a day past this had been good, for the mistake of the Clark must not make any Statute to be void: but yet I grant, if this were part of the jurisdiction, this ought to be pursued precisely as the law doth prescribe, but a petite addition or omission, so that be not in point of substance will not hurt that: and this is not part of the jurisdiction, but it is to the Statute according to the intentions of the parties, and the day is only part of their agreement; but it hath been said, that this had been idle, for the Statute shall not be taken so to pay presently, but I say the contrary, for though he had not his money in his hand, yet he will not trust him but will have his securitie, and yet I agree to the difference before, that there ought to be a time certain, and not

Trin. 22. Jac. C. P. to be proved after by averment; and here when no time is fixed, this is payable presently; but there shall need to be a request, then I hold it is out of the Statute, and when Statutes are obscure, they ought to be interpreted according to the rules of the common Law, and as to the case of an obligation, it is payable presently, and we ought to intend that the Maior takes notice, that this ought to be paid presently, for ignorance of the law is not supposed of any; besides, if this Statute be absolutely void, then the partie is without remedy, and in such a case we ought to be favourable in our expression: and so I conclude against the audita querela.

The argument of the *Lord* chief *Justice Hobert.*

HObert chief Iustice to the same intent: I hold that the Statute is good, and we ought to beware how we destroy assurances, except it be upon good and sure grounds: and it is a perilous case, to make an ignorant man to lose his right by a slip, and we ought to be the more warie, because this is for Merchants, and the Statute was made for their securitie, and by intendment they are men of forraign imployment, and so have the less occasion to know the Law, and these Statutes of traffick are to be cherished and not be pared to the verie quick, and we all agree that every substantial matter ought to be pursued, but not circumstances, and then the question is, whether this be substance or circumstance, and we also agreed that there ought to be a time certain when the money shall be paid, and that is either an actual time or a legal time, and for the material points, that ought to be acknowledged before an officer, and in the Statute of Acton Burnel this word Maior is in that, and no other principal officer, and yet there is no doubt but that this may be taken before another, who is a principal officer of a corporation, though he be not a Maior. Secondly, this ought to be also before the Clark. Thirdly, it ought to contain words obligatorie. Fourthly, there ought to be a person bound. Fifthly, this ought to contain a summe, but it may be a doubt if an action of debt will lie for that. Sixtly, it ought to be under the seal of the partie. Seventhly, it ought to be under the seal of the King. Eighthly, the inrolment is also necessarie, and this Statute is such a remedy as the Common Law never gave to the King himself, so all assurances in this kind are to be made to the Merchants, and certainly in our case the day is not so material; but the time which the law will take notice of, for the ignorance of the Maior must not make any Statute void, and I do not grant the case, that if this was to pay 10.l. after the death of S. P. this will not make that void, but if the Statute be to pay at several dayes, then then it is a quere in law, whether it be payable till all the dayes of payment be past as of a bond; and for the writ, it is but to proportion our actions according, and to do after this way, or manner; and so upon the whole matter I conclude that the Statute is good, and that the audita querela doth not lie; and judgement per Curiam was commanded to be entered against the Plantiff.

Ante, 79. Cro. Jac. 688. 1. Jon. 51.

The case of Giles Bray was moved again in arrest of judgement, and Hendon said, that the Plantiff had declared of a waste made after the death of the said Edmund Bray the Grandfather, which was to his disinheritance &c. and the Jury did finde the original lease and assignment, and they found that the waste was made before such a day, which was before the death of the Grandfather, and now he said, that because it is found generally, that before the death of the Grandfather the waste was made, and this was found precisely, and it is not found precisely, that at the time of the waste made he was termor in possession, and that is not good, for it may be that he made that before the assignment, and then it is not punishable of waste, and if the waste was made in the life of the Grandfather, he ought so to

have

have declared, for otherwise it was not immediately to his disinheritance; nay, the Grandfather might have during his life released or confirmed to the Tenant, and so have determined the waste, and then he in reversion shall not recover: like to the case where an Abbot declares of the waste against the lessee of his predecessor, and declares of waste generally, this is not good, for if this was made in the time of his predecessor, then he may not punish that, and so in our case, perchance the Grandfather had released, and then he in reversion may not recover, but as to the first exception the Court seemed, that because the Plaintiff shewed expressly that he was possessed by vertue of the lease, and he being so possessed made waste, the finding of the jury shall be agreeable to that: and so this exception was over ruled, and for the other, the rule of the Court was, that whether this waste was committed in the time of the Grandfather, or after his death, this waste was to his disinheritance, and the Grandfather by his release might not by any means discharge that waste, for he may not transfer that privilege, and so the judgement was given for the Plaintiff. Trin. 22. Jac. C. P.

The residue of Trinity Term 22. Jac. C. P.

Ante, 74.

NOw the case of Sir Robert Napper and Sir Thomas Earsefield, was moved again in which the Plaintiff assigned the breach, because that after Sir Thomas and his wife did live asunder, the land was not open nor subject to distress of Sir Robert Napper, and upon the opening of this to the Court, the Court conceived that this rent was granted to be paid immediately, and to distrain for that, but afterwards there is a clause, that it shall not begin in point of payment, till Sir Thomas and his wife did live asunder, and then it shall be paid the first day which was limited after: and Crawley Serjeant said, that the intent was, that it should begin presently, and that it should be subject to distress, and therefore to make that an entire covenant, is against the very intentions of the parties, for covenants in nature are several, also if they shall be construed, otherwise the partie shall be without the remedy which was intended (S.) a distress, but the Lord Hobert and Winch were of opinion, that if Sir Thomas Earsefield had received his estate truly, that he had but a reversion expectant upon a term for years, and then had made such a grant and such covenants, then in this case the covenant had not been broken, and then the meaning would be, that he should not have any rent till he had one to grant, but it doth not appear here, and therefore is a difference, and the covenant is broken, and Winch said, that the intent was, that the wife shall have that, for her maintenance when they did live asunder, so that then it shall be paid to the use of his wife, for this was in trust for her, and for that reason they ought to be several covenants of necessitie, for the state of the Mother of Sir Thomas Earsfield did not appear in those indentures, and then he ought to take that as it is at this time, and the appearing of that now is not material: and if any other construction shall be made, then the parties to the indentures shall be defamed: Hutton of the same opinion, that they are several covenants in the intent and meaning of the parties, and they are of several natures, for the first covenant is in the affirmative, the second is in the Negative, and the third is in the affirmative, and it is all one, as if the word covenant had been to every clause in express words, for he did not say, that this should be alwayes open, and lyable to distress according to this estate, for then it had been but one covenant, and it had been otherwise, for if no estate had appeared, he shall not be chargable in law, nor perchance he would not deal with him, and we ought not to take notice of any thing, but that which is upon record; nay, his own plea proves that they are several covenants, for to the negative covenant he pleads negatively, and to the other he pleads in the affirmative, and so the very intent proves them to be several covenants,

and

Trin. 22. Jac. C. P.

and Hobert of the ſame opinion, that it ſhall be taken as a preſent grant to charge the preſent poſſeſſion, and ſo judgement was commanded to be entred for the Plan.

Entred Easter Term 18. Jac. C. P. Ante, 81.

2. Dan. 671. pl. 2. Cro. Jac. 688. S. C. Hutt. 71. S. C. Bridg. 96.

The caſe of Goldingham and of Saunds, was now moved again by Serjeant Winch, and he prayes a writ of ſeiſin againſt Saunds, and the doubt was, whether the firſt judgement being abſolute with a ceſſat executio was good, or whether this ought to be conditional; and I conceive that in our books there are thoſe differences in this point, if the Tenant do vouch in a forraign Countie, then without any more the demandant ſhall have judgement againſt the Tenant preſently: 17. Ed. 3. 50. 13. H. 4 judgement 224. becauſe the demandant ſhall not recover, but onely in the ſame Countie, and the reaſon is clear in Anne Beddingfields caſe, becauſe the original may not extend to another Countie; but if the voucher be in the ſame Countie, then in ſome caſes it ſhall be againſt the vouchee, and in ſome caſes it ſhall be againſt the Tenant, and if the vouchee will come and render Dower, then the judgement ſhall be conditional againſt him &c. if he had in value, and if he had not, then againſt the Tenant, and the other againſt the vouchee, and ſo is Dyer fo. 202. and Grayes caſe was a conditional judgement againſt the vouchee, and ſo is the caſe 18. Ed. 3. fo. 56. out of which books I note that in ſome caſes, the vouchee ſhall have judgement againſt him, and the judgement in that caſe ſhall be conditional, and ſo if the vouchee make default, then the judgement ſhall be conditional againſt him 4. Ed. 3. 35. the old print: 2. H. 4. 7. but if the caſe be, that the demandant is delayed in his execution by the vouchee, then he ſhall recover againſt the Tenant, as if vouchee be in the ward of the King Dyer 326. and ſo in the caſe of a Common perſon, as is 17. Ed. 3. by the Repoꝛter, who alſo cites a judgement given in the time of the ſame King, though the opinion of the book is againſt that; but then it hath been ſaid, that this is miſchievous, for then the Tenant ſhall looſe his warranty: I anſwer no more then when he is vouched in the ward of a Common perſon, and over this the Law doth pꝛovide a remedie for him, as the Act of H. 8. if the feme be evict of the Dower by a title which is paramount, then ſhe may have a ſcire facias againſt the Tenant, and if the vouchee had not aſſets in this caſe, then the Tenant ſhall have execution againſt them as they hap, and ſo is the judgement in Dyer 202. and there was a judgement in this Court 38. Eliz. Marie Aſhburnham bꝛought a writ of Dower againſt Skinner, who vouched the heir of the husband, as in this caſe, and they were at iſſue upon aſſets in the ſame Countie, and the ſame judgement as here, and it was found by verdict for the vouchee, and after the judgement and before the voucher was determined, a writ of eꝛꝛoꝛ was bꝛought, and affirmed, and our caſe here is as ſtꝛong as this, and ſo I pꝛay a writ of ſeiſin for the demandant. Serjeant Hendon to the contrary, the queſtion is, whether this ought to be a conditional judgement, oꝛ whether this may be abſolute with a ceſſet executio as the caſe was here, and I ſhall lay this foundation, that it is in the election of the feme when the heir is vouched in the ſame Countie, whether ſhe will have the ſame againſt the Tenant, oꝛ vouchee; but for the caſe of 17. Ed. 3. that is but a quere of the Repoꝛter which I do not value, for the book it ſelf was otherwiſe, that it ought to be conditional, becauſe it is in the election of the feme to have that againſt either: and for Dyer 202. there the queſtion is, whether the judgement ſhall be pꝛeſently oꝛ ſtay and expect till the iſſue is tried between the vouchee and the Tenant, but no queſtion whether this ſhall be conditional oꝛ no: and the reaſon is, when he is vouched in the ſame Countie if he had aſſets, then ſhe had not election, for there it ſhall be onely againſt the vouchee, if that be found by verdict, oꝛ confeſſal, and this is for the benefit of the purchaſoꝛ, and alſo for the benefit of the demandant: in Dower for the warranty in the antient time was the Common aſſu-

Gook. 9.

See 27. H. 8. cap. 10. & 32. H. 8. cap. 5.

rance

rance of the realm; and for that reaſon, if the judgement may be againſt the heir, it ſhall never be againſt the Purchaſor, and alſo it is for the benefit of the feme, who is demandant in Dower, for if ſhe be indowed againſt the Tenant, and afterwards ſhe be evicted ſhe ſhall not have a ſcire facias, but if it was againſt the heir, then ſhe ſhall have a ſcire facias to have in recompence: and ſo is 16. Ed. 3. Judgement 3. that if in Dower the heir is vouched and made default the judgement ſhall be againſt him; out of which I do conclude, that the judgement ought of neceſſitie to be conditional, for by this the State of the feme, and of the Tenant is preſerved, for if the feme ſhall have that againſt the heir, then ſhe takes her warranty in Law, and therefore if the judgement at the firſt may be abſolute, then you take away all advantages from the feme and the purchaſer, if it hap that it ſhall be againſt vouchee, and for that reaſon it is not good, for it is unalterable, and it is a principle in our Law, that the feme ſhall recover againſt the heir, if he be vouched in the ſame Countie if he had aſſets, and not againſt the Tenant 6. H. 3. Dower 16. the demandant ſhall recover immediately againſt the vouchee, when he was vouched as heir, and ſo is 18. Ed. 3. recovery in value 16. et 31. Ed. 3. vouch. 30. there the judgement was againſt the vouchee, though he had nothing by deſcent at the day of the writ purchaſed; & there is a writ in the regiſter, which recites ſuch a recovery voucher and judgement conditional, and ſo is the 34. H. 6. expreſſly: and for that to ſay, that the judgement may be abſolute, is to make all thoſe books erroneous, and the caſe of Dower differs from all other caſes of vouchers; for if land diſcend in tail, it is ſufficient aſſets for the feme to have Dower, becauſe the feme is dowable of them, for this ſufficeth to ſay, that he had aſſets generally 7. Ed. 2. Dower 184. out of which I conclude, that this voucher is not like to other vouchers, but this is onely to ſecure the eſtate of the Purchaſers; and then as to the preſident, I anſwer firſt, it was found there, that the vouchee had nothing: and alſo it was never debated, for a writ of error was brought of that and nothing done, for this was referred to Arbitrement, and ſo I pray that no writ of ſeiſin may be awarded: and the Court ſeemed to be of opinion, that the judgement may be conditional, chiefly Hobert and Iones vehemently, but now they ſaid becauſe that judgement is once given, they are not to reverſe their own judgements, and to give another judgement, and now it is as if he had no aſſets, but yet that doth not give an erroneous judgement given before, and therefore if the Tenant will be relieved, he ought to bring his writ of error, but it was ſaid, that if this judgement was to be given again, this was as it ſhould be, becauſe that is all one now as if he had not aſſets, and the judgement ſtood as it was.

Trin. 22. Jac. C. B.

Potter againſt *Brown*. Anſ. 70.

152. pl. 14. S.C.
1. Dan: 143. pl. 17.
Cro. Jac. 687. S.C.
Hutt: 72. S.C.

NOw the caſe of Potter and Brown was moved again, and Hendon took two exceptions as before, firſt for default of averment; and ſecondly, the words are not actionable, for it was adjudged in Lanes caſe, if one ſay of another that he is as arrant a Thief as any is in the Goal of Warwick, this is not good without averment, that there are Thieves in Warwick Goal, and here it ſhall be ſo, for the law doth not ſuppoſe, that there are Thieves in England, and beſides here in this caſe the ſubſequent words do qualifie the other, for the words under the (for) ought to be of ſuch a thing as is Theft, and that is not ſo in our caſe: Serjeant Richardſon to the contrary: the laſt words do not qualifie but rather aggravate them, for he gives a reaſon of his ſpeach, and this taking is to be underſtood with a felonious intent, for the firſt words do charge him to be a Thief, and therefore the laſt words ſhall be intended, that he took them with a felonious intent, for he did not only charge him in the general but in particular; but the Court ſc. Hobert, Hutton, and Winch ſaid, that the Plaintiff ſhall not have judgement; becauſe he failes of averment, for he did not ſay expreſſly, that he is a Thief, but

Trin. 22. *Jac. C. P.*

as arrant a Thief as any is in England, and we are not to enquire after words, except they are plain, for if one ſay he was in Warwick Goal for ſtealing of a Horſe adjudged not to be actionable, and we may not preſume, that there are Theeves in England, and ſo judgement was arreſted.

Adams againſt *Ward*.

+

Cro. Jac. 186. p. 1. S. C.

INtra. Trin. 21. Iac. Rot. 1845. note that it was ſaid, in an action upon the caſe between one Adams, and Ward an Attorney, that whereas one Hennings ſued Adams in an action of debt, and Adams retained Ward to be his Attorney, and gave him warrant to plead the general iſſue, and Ward ſuffered the judgement by nihil dicit, that this was not any cauſe of an action, except it was by Covin, and for that if Adams had not laid in his declaration, that this was by Covin, he ſhould not have recovered, and at another day it was agreed, that the Covin was not traverſable by Plea, but only in evidence at the Bar.

Cook againſt *Cook* in Dower.

Palm. 445. S. C. vide.

IN a writ of Dower between Cook and Cook they were at iſſue, and at the day of niſi prius the Defendant pleaded, that the demandant had entred, and was ſeiſed, and yet is ſeiſed ſince the laſt contrivance &c. Octabis Sancti Hilarii ultimo quo die continetur uſque ad hunc diem &c. viceſimum diem Februarii which in verity was the day of the niſi prius, and it was demurred upon this Plea for two cauſes: the firſt was, becauſe he had not ſhewed that the Tenant was diſſeiſed, for otherwiſe it ſhall not abate the action, and to ſay that the demandant was ſeiſed was not ſufficient, for though this implies ſo much that the other was diſſeiſed, yet here it ought to be expreſly alledged, but the Court ſpake nothing to this; but Winch thought this to be very good according to Dyer 76. there the entrie is pleaded only, and yet good: but they reſolved that the pleading of the continuance is not good, for it is from one Term to another niſi prius juſticiarii Venerint, &c. and he ought to have preciſely ſhewed that: but the queſtion now was, whether the demandant ſhall have judgement to have ſeiſin, or have aperite Cape only: and Iuſtice Hutton ſaid, that it was adjudged in Sir Henry Browns caſe, that if a man pleades an inſufficient Plea after the laſt continuance, there the Plaintiff ſhall have judgement, as if the firſt iſſue had been tried for him: and for this he cited the new book of entries fo. 178. and this may not be a judgement by default, for they both appeared, and therefore he ſhall have the ſame judgement, as if the firſt iſſue had been tried for him; and it was ſaid in this caſe, though the Defendant did demur generally, yet this is very good.

The reſidue of Trinity Term in the 22. year of King *James*.

GOdſel an Attorney, brought an action upon the caſe for words, and he laid in his declaration, that the Defendant ſpoke thoſe words among other. Maſter Godſel is a knave, for he forged falſe deeds for which he was impriſoned at York, and ſhould have loſt his ears, and the jury found only theſe words, Godſel is a forger of writings, and deſerves to loſe his ears, and Heydon moved in arreſt of judgement, that the words which are found are not the words in the declaration, for the words were there that he forged deeds, and it is only found to be writings, and it was adjudged in this Court, between Brown and Ellis, that for

for ſaying an Attorney had forged writings, no Action will lie, for they are too generall, and beſides it doth not at all appertain to him to make writings, and ſo for Nowels Caſe, he is Cooped up for forging of writings, and it was adjudged not to be actionable, and ſo to ſay he is a forger of writings, by which he had cozened fatherleſs Children, the words are not actionable, becauſe he did not ſay Deeds, and upon this motion and reaſon the judgement in this caſe was arreſted. Trin. 22. *Jac. C. P.*

This caſe is Entred *Hillarie* the 21. *Jac. Roll.* 550.

Sir *George Trenchard* againſt *Peter Hoskins*

2. Ro. Ab. 250. pl.
Liff. 62. 65. 185. 20

TRenchard brought an Action of Covenant againſt Peter Hoskins, and declared upon an indenture bearing date the 19th. of September 44. of Eliz. made between John Hoskins father of the Defendant, and the Defendant on the one part, and the Plantiff on the other parte, by which they bargained and ſold certain lands to the Plantiff in Hammond which indenture rehearſeth, that King Henry the eight was ſeiſed of this land in his demeaſne, as of fee in the right of his Crown, & from him conveyed that to Ed. 6. who in the 7. year of his Raign by his letters patents bearing date at Weſtminſter, he granted that to one Fitz Williams, & to Hilton in fee, as by his letters patents may appear, & they being ſo ſeiſed by indenture which boze date &c bargained and ſold that to Henry Hoskins and to Proud, & alſo recited that Proud releaſeth to the ſaid Hoskins all his right, as by the ſaid releaſe may appear: and conveyed that to John by diſcent: and ſo the ſaid John being ſeiſed he and his ſon Peter made this conveyance to the Plantiff upon a good conſideration, in which they did covenant with the Plantiff in this manner, and the ſaid John and Peter for them and there heirs do Covenant and grant to, and with the Plantiff &c. that they the ſaid Peter and John Hoskins according to the true meaning of the ſaid indenture, were ſeiſed of a good eſtate in fee ſimple, and that the ſaid John and Peter or one of them, have good Authoritie to ſell that according to the intent of the ſaid indenture, and that there was no reverſion, or remainder in the King by any Act or Acts thing or things, done by him or them: and the Plantiff laid the breach that neither John nor Peter had a lawful power to ſell, the Defendant pleaded that John had a good power to ſell that, according to the intent of the ſaid indenture, notwithſtanding any Act or Acts made by him or his father, or by any claiming under them, and upon that the Plantiff demurred; and the caſe was now argued by the Court, and Iones Iuſtice began, and ſaid that his opinion was, that the Plantiff ſhall be barred, the caſe being upon conſtruction of covenants: and the ſole queſtion is, whether they are ſeveral covenants, or only one covenant, and I held that they are all one covenant, and thoſe words for any Act or Acts do relate to the two other precedent ſentences, and ſo it is all but one covenant, though this ſtand upon ſeveral parts, for if theſe words were placed in the fore-front there had been no queſtion, but that this had been but one covenant, and this made no difference when it is ſet before, and when it is ſet after, and the repeating of that had been tautologie, for if I covenant I will build a houſe at Dale, Sale, and a vale of Brick, here Brick ſhall refer to them all, becauſe it is tied in one entire ſentence and covenant; and ſo if I covenant with you, that I will goe with you to Canterbury, to Salisbury, and Coventrie here the word goes relates to all 3. as in the caſe of Sir Henry Finch, the rent was granted out of the Manor of Eaſtwel, and not of the Meſſuage lands, and Tenements lying and being in the Pariſh of Eaſtwel, or elſe where in the ſame Countie belonging thereto, and reſolved that land which is not parcel of the Manor is

Trin. 22. *Jac. C. P.*

Cook 8. & 9.

Cook 2. & 5.

Cook 4.

Cook 8.

Cro. Eliz. 208.

Ow. 84.

not charged with the rent, because it is all but one sentence and one grant; and cited the case of Althams case, and Hickmots case, where special words will qualifie general words, where they are all in one sentence, and so I conceive they are but one covenant, especially in the intents of the parties, and upon the intents of all the parties of the deed, for when a deed is doubtful in construction, the meaning must be gathered from all the parties of that; but yet that is tied with two cautions, that it be not against any thing expressed by the said indenture; but only in case where it is doubtful, so Cheineys case and Baldewins case, a habendum will destroy an implied premisses, but not an expressed, and so in Nokes case, an expres particular covenant qualifies the generalty of the implyed covenant: like to the case which was 32. Eliz. in the Court of Wards, between Carter and Ringstead, where Carter was seised of lands in Odiham, and of the Mannor of Stoy, and there covenanted, that he would Levie a fine to his son of all his lands in Odiham in tail, and for the Mannor of Stoyes, that should be to the use of his wife, now these subsequent words drew that out of the tail, according to the intent of the parties, and so in our case; and I also take an exception to the form of the declartion, for he conveyes that to Fitz Williams, and to Proud, and Hoskins by the name of all his lands and Tenements which were in the tenure of Anne Parker, and did not aver that these lands for which the Covenant was made, were in her hands; and for that it is not good, and for these reasons I conceive the Plantiff shall be barred.

The argument of *Hutton Justice.*

HUtton to the contrary, I hold that they are 3. several Covenants; and yet I agree the cases afore cited, and the reason is, they are all included in one sentence, for it is the care of the Purchasor, that he had an owner of the land before he purchase, for that which is the ground of assurances, that he is seised in fee, and hereafter that the Covents that this is free from incumberances made by him, and that he had good title to alien which strikes at the very root of assurances, and my first reason is, because here are several parties, and they covenant that one of them is seised of a good estate, and that they or one of them had power to alien that, for it may not stand with the intents of the indentures, to buy of him who had no title, and might not sell, and also the last Covenant is meerly in the negative, that they have made no Act or Acts by which the reversion shall be in the King; and that is all one, as if the word Covenant had been added in every clause of the sentence, and Covenants in law may be qualified by expres Covenants, but if a man made a lease for years upon condition to pay 20. l. in this case an entrie by the law is implyed for default of payment; but yet if it added that, if it be behinde he may enter and retain till he is satisfied of the 20. l. now in this case this had taken away the implyed Covenant and condition, but every expres Covenant must be taken most beneficially for the Covenantee, and in Nokes case it is said, that an expres Covenant controuls an implied one, but he may use either of them at his pleasure and election: and I grant Henry Finches case to be good law, for there is not any clause or sentence till after the Alibie; but yet in Dyer 207. they are distinct sentences, and shall receive several constructions, and so here the matter being several they shall receive divers constructions, and he Covenanted that he was seised in fee, and that he had power to alien that, and this was to encourage the Purchasers: and for the form he needs not aver, that this was in the hands of Anne Parker, for he had confessed that in the bar, that he came lawfully to that, and besides the Covenant is broken, though he never was seised, and so I conceive that the Plantiff shall have judgement.

Winch to the same intent, it is true if it had been all but one Covenant, then

if

if it had been no question this had not been broken; but I think they are several Covenants, like to the case of Sir Robert Napper lately adjudged; also the first two Covenants are in the affirmative, and the other in the Negative, and for that they ought to be answered with several pleas, and these kinde of assurances are the Common assurances, and therefore they ought to be interpreted favourably for the Purchasers, and Iohn was not deceived in these Covenants, for they brought down upon the deed an estate in fee, and it is also agreed if the word Covenant and grant had been divers times added to the several clauses, then they had been several Covenants, and now it is all one word, and made those to be several Covenants; and words of relation never will controul that which is certainly put down before; and so he concluded in this case the Plaintiff shall have judgement to recover. Trin. 22. Jac. C. P. Ante, 74. 87.

Hobert chief Iustice to the contrary, every deed ought to be construed according to the intention of the parties, and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence, and intent ought to be picked out of every part, and not out of one Word only: and here Peter joyned with his father to strengthen the assurance, and Iohn had not only his own estate, but the estate of Proud; and it is plain he never meant to intangle himself with other Conveyances, then those which he and Proud had made, and I hold this to be no independent Covenant, and it is all bound with one clause (S.) for any Act or Acts made by them &c. and it is confessed if these words had been placed in the forefront, that then they should relate to all, and it is as clear as if they were: and the first reason is, that the intent appears only to undertake for himself, because he should but have part of the land, and for that he was to warrant his evidence, and to that end he was to deliver to him his title at large in the said indenture? and here he had made the Plaintiff privie to every several conveyance of that to inform the Purchaser of it: and will you also intangle him with a covenant, you might have taken notice of his title; and it appears to be the very intents of the parties, that you should take notice of the title, and inform your selves concerning the same. Secondly, this is a sentence which may be taken both wayes: and I say it is agreed that if it had begun with these words notwithstanding any Act or Acts &c. that then it shall be all construed by this, and I never saw any difference: I grant they are several Covenants in point of fact, but not in point of obligation, for there are not several words of binding; nay I say if he had released this last he had released all, but it hath been said, that one is in the negative, and the other is in the affirmative: but I do not value that; and it hath been said, that this is the Common assurance of the Realm, and if other construction shall be made, then no man shall be sure of his own, we had given him leave to say that no reversion nor remainder is in the King by any Act by him made, and the King may not have any reversion, and be seised in fee, also this clause standing indifferent, whether this shall be referred to all or not, and then the question is, how the Court will adjudge of that, for my part I take it that this may stand with the intent of all the parties of the deed; but take that as you take it, that this destroyes all, for if he is absolutely seised in fee, what matter is where the reversion is, and yet if the reversion was in the Crown, and not by his Act you confess that may not charge him, which is expressly against the first Covenant, if this be distinct by it self, but take that indifferently, and all the parties will stand together: Nappers case hath no affinity with this, for questionless there were several Covenants, for in that indenture it did not appear what estate Sir Thomas Earlfield had, and for that reason nothing might be collected out of that, but he had a present estate; but in our case all is contained in the bodie of the indenture, and Nokes case is a strong case, and stronger then the case at the bar is, for thereupon construction of all the parties of the deeds, the special warrantie controuls the general warranty: and the reason is no man will take an express special warranty when the intent is, that he shall have a general warranty: there was a case lately adjudged between the Earl of Clanrickard

any

J. Jon. 7. Trin. 22. Jac. C. P. Hutt. 43. J. Brownl. 154.

and his wife againſt the Counteſs of Leiceſter, where the Lady pleaded that ſhe was Tenant in Dower, where in veritie ſhe had the reverſion in fee expectant upon a Term for life, and they conveyed all the eſtate the Lady had in Dower; and then they covenanted, that they would convey all their eſtate to the Lord of Leiceſter and his heirs, during the life of his wife, and then Covenanted that they would convey all their eſtate to the Earl of Leiceſter and his heirs for ever in the aforeſaid land: and it was reſolved, that though ſuch Covenant will raiſe an uſe to the partie who ought to have that, and ſo the reverſion will paſs if there had been no more words: now it was but during the life of the Lady for that third part, for the Covenant was but to ſtrengthen an eſtate, and not to convey it, and ſo he concluded that the Plantiff ſhould be hard, and after it was ſaid by the Court, that this caſe was not of weight to be brought into the Exchequer Chamber, and therefore the Court adviſed that the parties would agree; quere, for the reſidue in the Exchequer Chamber concerning that.

Entred Hill. 18. *Jac* the caſe of *Comendams*.

Richard Woodley againſt the Biſhop of *Exeter*, and *Mannering*.

Cro. Jac. 691. A. B. 142.

RIchard Woodley brought a quare Impedit againſt the Biſhop of Exeter, and Mannering who was Parſon of the ſaid Church, and he declared that Arthur Baſſet was ſeiſed of an acre of land, to which the ſaid Advowſon was appendant in his demeaſne as of fee, and that he the 13. Octobris 13. Eliz. granted the next advowſon to one William Manwood, who was then incumbent in the ſaid Church, who by his will 20. November made one Harcourt his executor and died, by whoſe death the Church became void, the which was the firſt and the next avoydance after the grant, and Harcourt preſented Cardon, and that the ſaid Arthur Baſſet ſo being ſeiſed in fee 18. Octobris 17. Eliz. by his will in writting deviſed to Iohn Baſſet his ſon the firſt and next avoydance of the Church aforeſaid, which firſt and next avoydance hapned after the death of the ſaid Arthur Baſſet, and that the ſaid Iohn Baſſet was poſſeſſed of the ſaid next avoydance, and the ſaid Chardon being incumbent 29. of September 37. Eliz. he was elected Biſhop of Down in Ireland, and he being ſo Elect, the Queen by her letters 37. of her Raign conſidering the ſmalneſs of the ſaid Biſhoprick; that it was not able to maintain him in his epiſcopal dignitie, ex gratia ſua ſpeciali conceſſit Lycenſavit et poteſtatem dedit to the ſaid Chardon Biſhop elect, that he with the ſaid Biſhoprick the rectory of Tedbome in comendum ad huc recepire et fructus de &c. in uſus ſuos convertere diſponere et applicare valeat et poſſit, habendum that in Comendam for 6. years, and within the 6. years he was conſecrated, and after the Term of the 6. years the Church became void, per legis Anglie, and that the Queen by her prerogative preſented one Bee who was admitted, inſtituted and inducted, and the Plantiff conveyed from Iohn Baſſet his title by his grant of the next avoydance, and ſhewed that the ſaid Church became void by the death of Gee, and that the vacation by the death of Gee is the next avoydance after the death of Arthur Baſſet, by reaſon whereof the Plantiff preſented, and was diſturbed, and upon his declaration Edwards the patron demurred, and the Biſhop claimed nothing but as ordinary, and Manering pleaded and confeſſed the ſeiſin of Arthur Baſſet, and the grant to Manwood, and the preſentation by Harcourt of Chardon, and the deviſe to Iohn Baſſet, but he ſhewed that after the death of Arthur Baſſet the Acre to which the advowſon is appendant, deſcended to Thomas Baſſet as &c. and he being

being to ſeiſed the Church became void by the death of Chardon, who had the next avoydance after the death of Arthur Baſſet, and that this remained void, by 2. years after his death, by which the Queen preſented by Lapſe the ſaid Gee, who was admitted &c. and Thomas Baſſet conveyed that to Edwards, and that became void by the death of Gee, and that he preſented the ſaid Mannering &c. abſque hoc quod prædicta vacatio Eccleſiæ prædictæ poſt Mortem de Gee was the firſt and next avoydance after the death of Arthur Baſſet, as the Plantiff had alleadged, and upon this bar the Plantiff demurred: and it was argued by the Counſel of both ſides on ſeveral dayes, and in Michaelmas Term enſuing, it was argued by the Court, but becauſe that Harvey was newly made Juſtice, he did not argue the caſe; but Juſtice Hutton began. Trin. 22. Jac. C. P

The argument of *Juſtice Hutton.*

AND Iuſtice Hutton after a recital of the caſe ſaid, that his opinion was, that the Plantiff ſhould be barred, and in the firſt place it is to be conſidered whether the King had any title at all to preſent by the Creation of Chardon to be Biſhop. Secondly, admit that he had title whether he had diſpenſed with that, and by his diſpenſation he had ſatisfied his prerogative. Thirdly, admit that the King had title, and that this was not ſatiſfied with the Commendam, whether the grantee had loſt his turn; and as to the firſt point it ought to be agreed, that when a parſon is made a Biſhop, that he is diſcharged of the Church by the Common Law, and ſo is the 45. Edw. 3. 5. and Dyer 159. petit. Broo. 116. and this is an avoydance by Ceſſion, and for any thing that I ſee in our books the King had not any title to preſent, except that he himſelf was patron, but becauſe that did not happen fully in queſtion here: I will not deliver any opinion: but I will ſay what our antient books do ſay 41. Edw. 35. adjudged that the King ſhall not preſent to a prebendary where the prebend was made Biſhop, and the title which the King had to preſent, was by reaſon that the temporalities of the Biſhoprick, of which he was prebend was in his hands, and ſee the 7. H. 4. 25. a good caſe 11. H. 4. 37. Dyer 228. and for Brooks preſentation 61. that is but the report of the Chancellor, who had that in preſentation; but our Common Law doth not warrant any ſuch thing, and then for the ſecond point, whether the King had diſpenced with his prerogative; and in the firſt place we are to know that theſe Commendams were at the firſt, but to ſee the cure ſerved, and by the opinion of Pollard, the ordinary is to ſee the cure ſerved, though that be charged with ſuch rents, that none would have it, and for that Commendams were at the firſt good, but now if the King had title, then that began per the conſecration, otherwiſe he ſhall never have it: and ſo is 41. Edw. 3. 5. if conſecration doth not give that he ſhall never have it: and hereby his grant to hold that in Commendam he had diſpenced with this prerogative, and if this had been granted to him for his life none will deny, but that he had diſpenced with his prerogative, and ſhall never take advantage of that again afterwards, and no more in this caſe, for he is incumbent to all intents and purpoſes, for Fitz N B. 36. he may have a Spoliation, and yet in this caſe he is parſon and Biſhop, and now that the King may diſpence with that it is not to be doubted; and I will compare that with the like caſes A. 6. Eliz. Dyer 252. where the King granted the Cuſtody of the land, and heir of his Tenant if he died his heir being within age, and this grant was to Cantrel, and it was agreed to be good, and Wardſhip is as Royal an antient perrogative as any appertains to the Crown: and 3. H. 6. title grant 61. the King may grant the temporalities of the Biſhoprick before it is void, which in my opinion is Coſen German to our caſe: out of which book I conclude the King may diſpence, and by the diſpenſation he is full parſon, and this is for his life, for the King may not make him incumbent, except it be for life, like to the caſe of Dyer fo. 52. where the patron and the ordinary

Trin. 22. Jac. C. P.

nary made a confirmation of a lease for part of the time which was made by the parson, and agreed that this shall stretch to the whole time, and no better case may be put then the case of Packhurst, in Dyer 22. 8. where Packhurst was incumbent of the Church of Cleave and was made Bishop of Norwich, but before he was created Bishop, he had a dispensation from the Arch-Bishop to retain that in Commendam for 3. years, notwithstanding his advancement; and he resigned during the 3. years and issue there taken upon the resignation; and this case proves all the partes of our case, first that the King may dispence, and that by his dispensation he is compleat person to resign: and if he do resigne during the years, the King shall not have the prerogative to present again, for that was satisfied with the dispensation: and also when the King came to his prerogative by subjects means, he ought to take that as it falls, for otherwise he loses that quite, vide Battervils case Coo. 7. and another reason is, if it be not satisfied, then the King shall have another which is mischievous, and this being a new case such president is not to have more favour then the necessitie of the Law will require: and so my opinion is, that it is all one as if it had for life: and there is a good case 9. Ed. 3. 20. where the King had 2. presentments, vide the case; but it was upon another reason, but the case of 21. H. 7. 8. Frowike: where the grantee of the next avoydance had judgement to recover, and the incumbent resigned, so that it is the second presentment, yet the Plaintiff shall have the effect of his judgement, and he had a writ to the Bishop; quere the application, for I did not well heare that, but in our case, if the prerogative of the King was not satisfied; yet it ought to appear that when he presented Gee, he had no title, but that was an usurpation: and if the King was not satisfied, then the Plaintiff shall not have judgement, for then Gee was an usurper: and upon that declaration the Plaintiff shall be barred; but now for the last point, admit that the King was satisfied of his prerogative by his presentation of Gee, whether the Plaintiff had lost his course, & I think he had, & in the first place the words of the devise are the first, & the next avoydance which shall hap after the death of Athur Basset, now it hath been objected, that the King had the first by his prerogative, and therefore he shall have the second, & I think in this case Brook presentation 52. is a strong case, where a presentation was granted to one, and after to another, when the first is void, and ruled that the second grantee shall not have the second, and so Dyer 35. it ought to be taken according to the words, for otherwise he shall not have any, for modus et Conventio vincunt Legem, and the case of quare Impedit 152. proves something to this purpose, for a man had 4. advowsons, and granted the next which should hap of them to I. S. and he died, and the heir assigned the wife for her Dower one Mannor to which the advowson was appendant, which first became void, and ruled that the Grantee shall not have that against the feme, and then it was moved by Thorpe, that he shall have the second, but Shard said certainly never, which proves that, if the turn of the Grantee was taken from him by the indowment of the feme he had lost that forever: the like case is the 15. H. 7. 7. 14. H. 7. 22. moved by Mordant, that the Grantee of the third shall have the fourth, when the wife is indowed of the third, which case is brought to prove a case, which without question is not law, and that is that the King being Gardian of the Grantee of the next avoydance, and he grant that, in this case the heir shall have that at his full age, which without question is now law, for by the same reason his course may be the 20. but there are two rules from this, which seem to cross this opinion: one rule is that the words of the grantor shall be taken most strong against himself, and the other that the Grantor shall not be received to avoid his own grant, as it is said in Davenports case Coo. 8. but yet these rules are to be intended where the words are compleat, for as the case is the 13. Ed. 3. Grant 65. that where the husband and his wife are joynt Tenants for life, and he in reversion grant the lands only which the husband held, in this case nothing passeth, for the reversion was expectant upon a lease which the husband and wife held: nay, I will cite one case, where a man by his own Act shall

avoid

avoid his own grant: in a quare Impedit Elmes againſt Taylor, where a man was ſeiſed of the Mannor, to which the advowſon was appendant, and he granted the third next avoydance, and after againſt his own grant he uſurped, and it was adjudged, that by this uſurpation he had gained the advowſon, to be appendant to his Mannor again, and that the Grantee had loſt his courſe, and ſo the caſe in Dyer 283. where the Church was void, and the patron granted the next avoidance tunc vacant. to another, and this pro hac unica vice tantum: and there reſolved, that the grant was not good, and that it ſhould not extend to another: and ſo in our caſe it ſhall not extend to a ſecond: another reaſon is, if the King had a prerogative he is bound, and every derivative eſtate under him, for he ſhall not be in better caſe, then the grantee, for he was bound by the law of the land: and for that it is equitie, and it is Juſtice that the eſtate of the grantee ſhould be bound, and ſo in this caſe, like to the caſe in Plowden 207. and Dyer 231. where by Act of Parliament the poſſeſſions of an Abbot were bound, now if afterwards the Abbot made a leaſe for years, or granted the next avoydance, and then after they came to the King, he ſhall avoid the grant, for the intereſt of the Grantor was bound by Act of Parliament, and ſee the caſe of the univerſitie of Oxford Coo. 10. where a man before he was a recuſant convict, he granted the next avoydance, and after he became a recuſant convict, and then the Church became void, now the grantee ſhall not preſent, for his intereſt was bound by Act of Parliament, and ſo he muſt take it, and here it behoves him to take that, as it is bound with the prerogative of the King: and ſo upon all the matter he hath loſt his title, and he concluded that the Plantiff ſhall be barred. Trin. 22. Jac. C. P.

The argument of *Juſtice Winch.*

WInch Iuſtice of the ſame opinion, but becauſe his argument was much to the purpoſe of that with Hutton, and the Lord Hobert; therefore I will not Report that verbatim; and Winch ſaid, I will ſpeak to the laſt point which was moved by my brother Hutton, and I hold that where he had the firſt granted to him, now he ſhall have none at all, for it is punctually expreſſed that he ſhall have the firſt, and that ſhall not extend to the next which may be granted: but I grant if two coparceners had an advowſon, and the eldeſt preſented, and then ſhe granted the next avoydance, that in this caſe the grantee ſhall have the next which may be granted, and the reaſon is, becauſe ſhe may not diſpoſe of the eſtate of another; but if in this caſe the courſe be evict, by title Paramount of the King, then the grantee had loſt that, and he cited the caſe of Brook preſentation 52. and Gilbie and Iuxtons caſe, which was directly adjudged with the caſe of Brook, in which he was in counſel as he ſaid: and he ſaid that the book of 15. H. 7. is not to be relied upon for Law: and he cited, quare Impedit 154. and ſaid, that the King in this caſe ſhall not have the preſentation againſt the deviſee, for he had a title ſetled before the title of the King, for though the prerogative of the King is more antient, yet his title is ſubſequent, and he cited divers caſes, where the title of the ſubject was before the title of the King, and ſo the caſe of the 15. H. 7. was adjudged, that he may not out the grantee of the next avoydance, and I think there is much difference between a patron of inheritance, and he who had only a turn to preſent, for there if the prerogative ſhall hold place, he had loſt all the fruite of his title, and he ſaid our antient books are, that the King ſhall not have any prerogative, except he himſelf be patron, but admit he had, then he had diſpenced with that, for the Commendam may not be for years; and the Commendam did not make any alteration; but only a diſpenſation, and the caſe in Dyer ſhews that he remained parſon to reſign, and ſhews plainly that the King had loſt it: true it is there are ſome few precedents of theſe Commendams: but there are none in our books, and for the aſſumption of the Biſhoprick, it is all one with England, for

Trin. 22. *Jac. C. P.*

the 17. Ed. the third, the Biſhoprick̃s are donatives, and Fitz N. B. 169. 14. Ed. 3. 26. Plowden 44. and the books are the Common Law that we have, and he ſhewed ſome precedents of theſe Commendams to the Court, and ſhewed the caſe of the Earl of Kildare, where the incumbent had a Church with cure in England, and an other in Ireland, and void for the Pluralitie; and 16. Eliz. Thorn-Borrow Parſonage was void, when the incumbent was made Biſhop of Ireland, and Bancrofts caſe who was Dean in Ireland, and then was made Biſhop of London, and it was holden, his Deanry was void, and 4. Iac. Dod was made Biſhop of N. and the Chancellor here in the right of the King preſented to the living: and if a benefic̃ed man do take a Biſhoprick, by the very taking of that his benefice is void, by the conſecration clearly by the Lawes of the land, for they are two incompatible benefices, and may not by any means ſtand together, and ſo upon the whole matter, in regard that by the aſſumption of the Biſhoprick, the benefice was void by the very conſecration, and if the King had any title, this was ſatisfied by his Licence, and diſpenſation to hold that in Commendam, and ſo he held the Plaintiff ſhall be barred.

The argument of the *Lord* chief *Juſtice Hobert*.

HObert chief Iuſtice of the ſame opinion, and after a Briefe Recital of the caſe, ſaid that his opinion was, that the Plaintiff ſhall be barred, upon the moſt of his caſe (S.) admitting that Clardon did live above the 6. years, ſo that the King did preſent Gee in point of prerogative, yet the Plaintiff had not title upon the moſt of his matter, much leſs upon the vitiouſneſs of his pleading, and firſt we are to deal, with the avoidance of benefices, with their compatibles, and then with the Commendams of the King: and firſt I hold if a benefic̃ed man take a Biſhoprick he hath clearly loſt his benefice by his conſecration, by the lawes of the Land, for they are two incompatible benefices, and they may not ſtand together, but in this we muſt diſtinguiſh, in this manner, firſt a benefice may be void by ſubordination, as where one is made Biſhop of the ſame Dioceſs in which his Parſonage is, & this is the very reaſon of Dyer 158. and 8. Ed. 3. 9. where a Prebend of the ſame Church is made a Dean, but otherwiſe if he be made Dean of another Church, and ſo my opinion is, if a Biſhop be made an Arch-Biſhop of the ſame province, where his Biſhoprick is; nay, if there is Parſon and Vicar of the ſame Pariſh with cure, and the Vicar accept the Parſonage, the Vicaridge is void, for the Vicaridge was derived out of the Parſonage, & our books ſay, it was a long time before they would give the Vicar any eſtate, and the reaſon was, becauſe here was a Corporation erected without Lawful Authoritie, chiefly by the ordinary with the conſent of the Patron: and this caſe hath not his fellow in the Law, and it is de novo that it is made, for ab nitio non fuit ſic: and that alſo had inabled him to bring an action againſt the Parſon; and alſo it gave to him a freehold, but the chief reaſon was he eaſed the Parſon in his dutie, and therefore good reaſon he ſhould have part in the profit, but in our caſe the reaſon of the ſubordination doth fail, for he is Biſhop of another Dioceſs (S.) in Ireland, and therefore we ought to ſearch for another reaſon, and without doubt the Law is all one in that alſo, and this is ratione eminentiæ by reaſon of the dignitie of a Biſhop, and ſo is Packhurſts caſe in Dyer ruled without any exception; and the caſe of the 44. Ed. 3. where one who had been prebend in England was made Biſhop in Ireland, and ruled the prebendary to be void, and becauſe the office of a Biſhop and a Parſon, do differ in the eminencie, therefore a Biſhop may not be a Parſon, and now for the other point, whether the King had a prerogative or no, I ſpare to ſpeak, becauſe there is no neceſſitie to draw that into queſtion, for the Plaintiff had admitted that, and the

the Defendant had not denied it: but for the Commendam I do not make question but the King may make one, and so may the Arch Bishop, but the power of the Arch-Bishop is potestas limitata, but the King had a double power, one by antient title before any claim made by the Pope, and the other by the Statute; but now for the other point, I think it is a Commendam for years, and first I hold if the case had been that he should hold that in Commendam with his Bishoprick in pristino Statu, that had taken away the power of the King to present afterwards, and the reason is plain, for the prerogative is to present to that which is void by the assumption of the Bishoprick, which doth never hap, for by the Commendam he had that still as before, but here the Commendam is for years, and if he do also resign during the years, then this is void by resignation, and so is the case of Packhurst, that when he resignes during the years of the Commendam, the Patron shall have that, and not the King: and so also my opinion is clear, that if he had died within the 6. years limitted by the Commendam, that the King shall not have that, for then it is void by death, and not by the assumption of the Bishoprick, which book proves directly, that a Commendam may be aswel for years, as for life; but yet I do not hold that upon those temporary Commendams, if the Bishop continued Parson during the years, and made no Act to impeach, that then is a void cause (S.) the assumption of the Bishoprick, for the Commendam was but to avoid the Cession by the assumption of the Bishoprick, and then when that is determined the supension is determined, and it is void by the original cause (S.) by the assumption of the Bishoprick: and this Commendam doth not turn the second or first Patron to any prejudice, for the incumbent is still in by the presentation of the Patron, and the determination of the Commendam is not any cause of the avoidance of the benefice; but this is quasi non causa, which is causa stolida, as the Logicians do term it: but in this case the assumption is the cause of the Cession, and it is like to the case of 25. Ed. 3. 47. where the King brought a quare Impedit against the Arch-Bishop of York for a Prebendary; vide the case: and ruled in that case, that the confirmation of the King had not taken away his title to present, and the reason was, because the confirmation had not filled the Church, but continued that full which was full before, and here this temporarie Commendam may not restrain the King to present afterwards, for this is not a presentation, and therefore may not take away the title of the King: and here the Plaintiff hath not well expressed it, for he hath not shewed in this Court, that the presentation of the King was lawful, neither that Chardon held that by vertue of the Commendam for all the 6. years, but only that the Church became void, by the Laws of England, and that is not sufficient: and then if all before were for the Plaintiff, yet the question is, whether he hath lost his turn: and I think that he hath, omnis argumentatio est à notoribus, and the first is better known, then the second, and the second may not be the first, and there when the devise gave him the first, it is idle to say, that he shall have the second, for that departs from the meaning of the words, and in every grant the law implies quantum in se est, and no man may say, that the devisor did intend to warrant that from antient Titles; and so the Lord Hobert concluded his argument, and said his opinion was, that the Plaintiff shall be barred, and judgement was commanded to be entred accordingly.

Trin. 22. *Jac. C. P.*

Michaelmas Term in the two and twentieth year of King *James* in the *Common Pleas.*

DAvenport moved for the amendment of a Record, where a recovery was suffered of lands, in Sutton in the County of York, and the indenture of bargain and sale was by the right name, and the indenture of uses by the right name,

1. Dan. 336. pl. 42. S. C.

Mich. 22. *Jac.C.P.* but the writ of entrie was of the Mannor of Sulton, and upon the examination of the parties to be recovery, that the recovery was to no other uſes then is expreſſed, and mentioned in the ſaid indenture, this was to be amended.

Sheis againſt Sir *Francis Glover.*

1. *Dan.* 181. *pl.* 21. *S. C.*

SHeis brought an action upon the caſe againſt Sir Francis Glover, and ſhewed for the ground of his action, that where one Harcourt was bound to the Plantiff, in a Recognizance &c. upon which the Plantiff took forth an elegit, and the Defendant being the Sheriff of the Countie, took an inquiſition upon that upon which it was extended; but he refuſed to deliver this to the Plantiff, but yet he returned, that he had delibered that, and upon that he brought his Action, and upon not guiltie pleaded, it was found for the Plantiff, and now it was moved in arreſt of judgement by Serjeant Hendon, and the reaſon he ſhewed was, becauſe he laid his action in an improper Countie, for though the return was in Middleſex where the Action was brought; yet becauſe the land lies in Oxfordſhire, where the ſeiſin ought to be deliberes the place is Local, and for that the Action ought to be brought there, and now Serjeant Breamſton argued that the Action was well brought in Middleſex, for this being but a perſonal thing, he may bring that in either of the Counties, as 14. Ed. 4. 13. Ed. 4. 19. expreſſly in the point, and to the ſecond objection that had been made, that an Averment may not be againſt the return of the Sheriff, to that Breamſton anſwered, that in an other Action an Averment may be againſt the return of the Sheriff, though not in the ſame Action, as 5. Ed. 4. but it was agreed to have a new trial by the preſervation of the Juſtices, for otherwiſe it ſeemed the opinion of the Court was, that the Plantiff ſhall have judgement upon the reaſons urged by Serjeant Breamſton.

Mary Baker againſt *Robert Baker* an Infant in Dower.

2. *Dan.* 675. *pl.* 3.

MAry Baker brought a writ of Dower againſt Robert Baker an Infant, who did appear by his Gardian, and he pleaded that his father who was husband of the demandant, was ſeiſed of a Meſſuage and of land in Socage, and deviſed that to the demandant for her joynture in full ſatisfaction of all Dower, and he ſhewed that after the death of his father, the demandant did enter into the ſaid Meſſuage, and land, and was ſeiſed of that by vertue of the deviſe, and to that the demandant did replie by proteſtation, that he did not deviſe, and for plea confeſſed the ſeiſin of the husband and her own entrie, but ſhe further ſhewed that the Infant, who was then Tenant, was but of the age of 14. years, and that ſhe entred as Gardian in Socage to the Infant, and diſagreed to accept of that by vertue of the deviſe, and traverſed the entire, and the agreement: and it was ſaid by the Court, that his bar is good, though it had been more pregnant to have alledged, that ſhe entred virtute legationis prædictæ, and ſo was ſeiſed, and after it was ſaid, that the Replication was very good without the traverſe, for this was not expreſſly ſet down, but that was but meerly the conſequence of the plea, which in veritie was not traverſable.

Hickman againſt Sir *William Fiſh.*

HIckman had judgement for 600. l. and 10. l. damages againſt Sir William Fiſh, and he acknowledged ſatisfaction for 410. l. of the ſaid debt, and damages;

mages; and after there was an agreement between them, that if Sir William did not pay the reſtitue by ſuch a day, that then it ſhould be lawful for Hickman to take out execution againſt the ſaid Fiſh, without ſuing of any ſcire facias, though it was after the year; and afterwards the money not being paid, Hickman ſued forth a Capias ad ſatisfaciendum againſt Sir William Fiſh, directed to the Sheriff of Bedfordſhire for 210. l. and now upon a habeas Corpus, Sir William Fiſh was brought to the bar, and Serjeant Crawley moved for a ſuperſedeas for him, becauſe the writ emanavit improvide &c. and by the Court it is a cauſe to diſcharge him of the execution, for the Capias ought to have iſſued for 200. l. only, and he ought to have ſued a ſcire facias, though this was after the year, becauſe the Proces was not continued, but they ſaid withall, it was in their diſcretion, whether they will grant a ſuperſedeas, for they may put the Defendant to his writ of error. Mich. 22. Jac. C. P.

It was ruled, that if an action of debt was brought, and the venire facias to trie the iſſue is in placito debiti, and ſo is the habeas Corpus, and the Pannel; but in the Jury Roll of the niſi prius, at the latter end of the jurata there it is placito tranſgreſſionis; and agreed in this caſe this is amendable, or in this caſe it is good without amendment.

Wen againſt *Moore*.

THomas Crew Serjeant did move in arreſt of judgement, where one Wen brought an Action upon the caſe againſt Moore, and upon non aſſumpſit, it was found for the Plantiff, and he ſaid that the Colloquium was laid to be at Bourn in the Countie of Lincoln, and the venire facias was de Vicineto de Born, without the letter (u.) and for that reaſon, that they are ſeveral Towns, therefore error, for if the entire Town is omitted: the trial is inſufficient; but the Court held this to be very good without amendment, and ſhall be intended to be the ſame Town.

It was moved in arreſt of judgement by Serjeant Finch, that where one had brought an Action upon the caſe againſt one, and ſhewed that the Defendant in conſideration of 12. d. given to him by the Plantiff, he aſſumed and promiſed, that if the Plantiff may prove that he cut quandam arborem, upon the land of Sir Francis Vain tunc creſcent. that he would give to him 10. l. and this being proved by the Plantiff, it was now moved in arreſt of judgement, that quandam arborem is an individual tree, and it ought to be aliquam arborem, and another cauſe was alledged, becauſe it was not ſhewed, that this was upon the land of Sir Francis Vain, then growing, but only he had ſaid growing, and that may be, for perchance he purchaſed the land afterwards, and before the Action brought, and ſo it might be growing, though not tunc creſcent. at the time of the promiſe, but the Court &c. Winch, Hutton, and Harvey, ſeemed that the declaration was good, for they ſaid there is no queſtion if quandam had been out, this had been good, for it is the ſingular number, and be that certain, or be that incertain, yet by the verdict it is made certain, that this is a tree, and alſo thoſe words tunc creſcent. do refer to the time when the tree was ſeld, and not to the promiſe.

Holman

Mich. 22. *Jac. C. P.*

Holman againſt Sir *Thomas Pope* and *Elizabeth* his wife.

SErjeant Hendon moved in a caſe, where an Action was brought by one Holman againſt Sir Thomas Pope and Elizabeth his wife as daughter and heir to Sir Thomas Watſon, and pending the writ, Pope died, and he moved that the writ ought not to abate, becauſe it is brought againſt her as daughter and heir, where the land is aſſets, in which the husband had nothing: like to the caſe of an Executrix, who brings her action in her own name, and the name of her husband, and pending the writ, the husband dies, the writ ſhall not abate, but Juſtice Harvey ſaid, this caſe of Executors was adjudged againſt him, and Hobert chief Juſtice was of opinion, that the writ ſhall not abate, but day was given over in that caſe.

Sir *Thomas Holbeach*, againſt *Sambeach*.

1. Dan. 654. pl. 2. 782. pl. 12. S. C. +

Cro. Car. 103. S. C. Hutt. 96. S. C.

IN the caſe between Sir Thomas Holbeach, and Sambeach in a replevin where a demurrer was joyned, the caſe was this, one being Tenant for life, and he in remainder in tail, joyned in a grant of a rent in fee out of that, and then they joyned in the levying of a fine to a ſtranger and his heirs, and in this caſe it was ſaid, that the eſtate of the grantee of the rent which before was determinable, is now made abſolute, and a judgement was alſo cited to be in that caſe lately adjudged: to which the Court ſeemed to agree, and they ſaid, if this be the point, they will give judgement preſently.

Crompton againſt *Philpot*.

HEndon Serjeant moved in arreſt of judgement, in a caſe for Philpot a crier of this Court, where one Crompton had recovered 40. l. damages againſt him, in an action upon the caſe, for words ſpoken againſt Crompton, &c. he innuendo the Plaintiff ſtole a ring, and had been hanged for that but for me, and it was ſaid in the firſt place, that it doth not expreſſly appear, that the words were ſpoken of the Plaintiff himſelf, neither is this introduced by any precedent Colloquium as it ought, for otherwiſe the innuendo will not aide it: but in veritie the declaration was, that the words were ſpoken de eodem Richardo innuendo &c. and alſo he ſaid, that the words are not actionable, becauſe that no value is expreſt, but it was ruled, if that were but petie Larcenie, the action lies, but the Court gave no abſolute opinion in the caſe, for they were willing to compound for the poor man.

The reſidue of *Michaelmas* Term in the two and twentieth year of King *James*.

Brown and *Ware* againſt *Barker*.

BRown and Ware brought an action againſt Barker, and they declared, that whereas there was a ſuit depending between the Plaintiffs and other Coppiholders, of ſuch a manner in the Chancery againſt Brook their Lord, and that one Woolſey

Woolsey was there Clark, and that he for his fees, and for the procuring of a decree had disbursed 14. l. and that there being a Communication between the Plaintiff, and the Defendant concerning the same, he being a Coppiholder of the same Manno, that in consideration, that they would pay to Woolsey 14. l. he would pay to the Plaintiffs 40. s. upon request, and the Plaintiff shewed, that they had paid the 14. l. and that the Defendant had not paid the 40. s. Licet postea sæpius requisitus fuisset, and upon non assumpsit pleaded, it was found for the Plaintiffs, and now it was moved in arrest of judgement, by Crook Serjeant. First because he is a stranger to the suit, for he had not alledged, that the Defendant was a partie, and then it is no consideration, but this was over-ruled, because they paid the 14. l. upon his request; the second exception was, that this postea sæpius requisitus, was not sufficient in this case, because that he ought to express the certaintie when, and the place where the request was made after the promise, and the 14. l. paid, and he said, there is a difference where a thing is a present dutie, and where it is a dutie upon request, or upon any Collateral Act, there the request is traversable, otherwise when it is a dutie upon a contract, or upon an obligation, there Licet sæpius &c. is sufficient, and according to this it was adjuged Hill. 18. Iac. Rot. 1894. debt upon an arbitrement between one Prideaux, and Walcot for the payment of 340. l. upon request, and it was alledged there, that he had not paid that Licet sæpius requisitus, and it was adjudged, that in this case it was not sufficient, because it was not a dutie presently, but upon the request, and the place where the request was made, ought to be put in certain, and he cited another case H. 16. Iac. between Hill and Moor, adjudged in this point of assumpsit, as in our case, for where it becomes to be a debt payable upon request, there ought to be alledged a time and place of the request: and so H. 30. Eliz. one Welborns case, where a man promised to pay so much money for costs of a suit, when he should be requested to pay that, and there after verdict, judgement was arrested: and Hobert said, that the request is part of the cause of the Action, and for that it ought to be set down precisely, and there ought to be a promise broken, and such a promise upon which an issue may be taken.

Mich. 22. *Jac. C. P.*

Bubles case.

IT was argued in the case of Buble, who was Administrator during the minoritie of an Infant, that the Court of the Marches of Wales have no Authoritie to force such an Administrator to accompt before them, but only the Ecclesiastical Court: and if they intermeddle in any such thing, this Court may grant a Prohibition.

The great case of *Cooper*, and of *Edgar* in *Ejectione firme*. *Post 115.*

+

2. *Dan.* 16. *pl.* 12. 3. C.
27. *pl.* 3. 114. *pl.* 1. 772.
1. *Jon.* 389. 3. C.
3. *D.* 219. *pl.* 3. 22
pl. 2.
2. *Ro. Ab.* 352.
pl. 10.

IN Ejectione firme between Cooper and Edgar for diverse lands in Norfolk, upon a lease made by Downey and his wife for 5. years, and upon the general issue the jury gave a special verdict to this effect; that one Henry Foyne was seised of land in his demesne as of fee, and 9. April 34. Eliz. infeoffed Iustice Windham and others, to the use of Anne his wife for life, the remainder to him and his right heirs in fee, and then Henry died, and that the reversion discended to Robert Foyne as son and heir to Henry, and he being so seised of the reversion 11. Jun. 10. Iac. by indenture made between Robert and Anne his Mother, who was Tenant for life, it was agreed that Robert should levie a fine of that in Trinity Term, and this fine was to be to the use of Anne and her heirs for ever, if Robert did not pay

Mich. 22. *Jac. C. P.*

pay or cause to be paid to Anne 10. l. upon the first of September next, and if he pay then it shall be to other uses (S.) to the use of the same Anne for life, of that part of which she was seised, and of the residue to the use of Robert and his heirs; and they found over that the fine was levied to the same uses the same term; and they found over, that Robert died at the age of 20. years, and a 11. monethes, and this was before the first of September, and it was found, that one Anne, and Elizabeth under whom the Plaintiff did claim were sisters and heirs to Robert: and that they had not any notice of the use, nor of the indenture, and that they did not pay the money upon the first of September, but that afterwards they entred, and made the lease &c. and the Defendant claimed under Anne, who is now the Lady Cesar, and now if upon all the matter the Defendant be guilty was the question.

And Crawley Serjeant argued for the Plaintiff, and the substance of his argument was in this manner, and first he said, that he conceived the points to be upon the special verdict, either to concern the antient estate, or the new estate of the Lady Cesar, and here we are also to consider, whether the uses are well created and stand good, by the indenture, and by the fine without the help of the special verdict, and first I will not dispute, when an Infant levies a fine, and dies before the reversal of that, whether his heir may avoid that, and this is ruled in Cooks Reports 10. H. 7. 16. that this may not be, because that this trial ought to be by inspection, which now may not be, when he is deed, but that which I will insist upon in the first place is this, when an infant made an indenture to declare the uses of a subsequent fine, and he doth after that at another time levie a fine generally without expressing of any use in the fine, whether he may any wise enter, and avoid the uses of the same fine, or whether the law of necessity doth adjudge the fine to be to the same uses, without the help of any Averment, and I hold that he may avoid those uses, which do stand upon this difference, that it is incongruous to reason, that if the law admits a man to be of ability to levie a fine, then at the same instant, or after he may declare the uses, because it it is intended, that he is of full age, and if this had been a fine with grant, and render in which there is alwayes an use expressed, as 26. H. 8. 2, that the grant of an Infant is absolutely void: but I do agree the case in Beckwiths case of a feme Covert, or of a man of nonsane memory, that their declaration of that subsequent use is good, because that the fine which is levied by them, is a perpetual Bar and conclusion, and by such means there disposal doth conclude them for ever: but it is otherwise of an infant, for he may avoid the fine by error during the minoritie, and the opinion of the book of 46. Ed. 3. 34. is, that if an infant do alien a rent, he may bring a dum fuit infra ætatem, which seems to infer, that the grant of an infant is not absolutely void; I answer that is but the admission of the Court, and 15. 7. 4. if an infant made a deed, and at full age he inrolled that, this is a conclusion for him to denie that, for this inrolment is an affirmance of that, and the reason of that is, because this is an affirmance of the same thing: but here the fine and the uses are distinct, and for that they are voidable, and for the other point the verdict had found, that the fine was levied to the uses aforesaid, whether that had established the uses, and made them unavoidable so long as the fine is in force, and I hold that it had not, for it is no more then ad usus supra dictos, and it had not bettered the uses, for they had no reference to aide the uses: like to the case of the Earl of Leicester in Plowdon, and the 5. Ed. 4. 41. and yet I grant that an Act of Parliament may make a thing void which was good, but so may not a fine, and so held the verdict had not aided that.

Cook 2.

The

Mich. 22. *Jac. C. P.*

The reſidue of *Michaelmas* Term in the two and twentieth year of King *James*.

AND now he argued to the third point, which is the great point, whether thoſe words if Robert do not pay, make a ſubſequent or a precedent condition; and I hold that it is a precedent condition, and this interpretation ſtands beſt with the intentions of the parties, for before Ann had an eſtate for life, and Robert in fee, and if a preſent uſe will ariſe, then Ann ſhall have all preſently, and leave nothing to Robert, but if the uſes do forbear ſetling till the firſt of September, and ariſe according to payment, and all the doubt ſtands upon this word (if) which is ſome time taken as a limitation, as if a man gives land to another, and to the heirs of his body, and if he die without iſſue, then to another there (if) is a limitation, as it is in Beſtons caſe: but here this refers to a contingencie: and therefore it is a condition, and ſaving the opinion of Hide and of Mountague in Colthurſts caſe: I hold that (if) there was a condition, and regularly (if) is a note of a precedent condition: and I will firſt prove, that by Logick, for the word are an intire Hypothetical propoſition, (S.) the uſe ſhall be to An if &c. and in this is a Hiſteron proteron invertio ordinis partium, that the conſequent ſhould be before the Antecedent: in this manner if Robert do not pay 10. l. to Anne the firſt of September, then it ſhall be to the uſe of Anne, and ſo quelibet pars in Loco proprio redigenda eſt, and then if it is ſo, it is no doubt but this is a precedent condition, and he cited Wheelers caſe 14. H. 8. a man granted his Term, if he could procure the good will of his Leſſor, and this was adjudged to be a precedent condition, and ſo is Bracton Lib. 2. cap. 6. if the condition is in futuris, then it is always precedent as to do talem rem ſi dederis mihi 10. s. there it is ſaid, valet donatio ſed ſuſpenditur tanquam &c. and if we obſerve quite thorough Wheelers caſe this is always a note of a precedent condition, and yet I grant that in ſome caſe it may be a note of a ſubſequent condition, but that is quando impediatur &c. as in the principal caſe in Colthirſt ſi vellet inhabitare there of neceſſitie this ought to be a ſubſequent condition.

Now the next point is, whether the condition is diſcharged by the the death of Robert before the firſt of *September*; and I hold that it is, for If diſtinguiſheth as if the word had been, that if Robert do not pay; yet if he die before the day, he is diſcharged of the payment, for there was not any default in him, for all humane contracts muſt give way to this Statute of mortalitie, Statutum eſt omnibus mori, and there was not any default in the heir of Robert, for he was not bound to pay, and therefore he needs not to do that being to his prejudice, but my chief reaſon is upon the general rule of all conveyances, for our law in its inſtitution was a Law of mercy, and will indeavour to juſtifie Acts made in obedience to that, and to excuſe defaults of diſobedience: and this is the reaſon of Maſter Littletons caſe, if a feoffment is made upon condition, that if the feoffor pay 10. l. ſuch a day &c. now that being to reduce an eſtate is not taken litterally, but if the heir or executor pay that, this is ſufficient to reduce the eſtate, and ſo it may be paid at other places, and to other Perſons, and ſo if the condition is to be performed of the part of the feoffee, there his feoffee may pay that.

The next point is, whether any notice is requiſite, and he held that there ought to be notice, becauſe the heirs are ignorant of that; and in ſome caſe where a man is bound to take notice of that; yet by the Act of Law, that ſhall be diſcharged, as in Sir Andrew Corbets caſe: but now for that laſt point, whether the antient eſtate for life is gone, and it is clear, it was gone by the Common Law, Cook 4.

Mich. 22. *Jac. C. P.* Cook 7.

but the queſtion is, whether it is within the ſaving of the Statute, of the 27. H. 8. and I hold it is not, for this is repugnant to the eſtates conveyed, and to the uſes limited: true if this had been a leaſe for years, then it had been ſaved, as is reſolved in Lillingſtons caſe, and Dyer 344. but this being a freehold confounds the nature of the fine if it ſhall be ſaved, for the nature of ſuch a fine is to carry a Franktenement, and this is repugnant to the uſes limited, for it is preſently in Anne and her heirs, if Robert do not pay, and for that if the Franktenement is ſaved, there is no uſes limited of that, which is contrary to the intent of the parties, and alſo here the Conuſee took an intereſt by the fine, and for this it is out of the ſaving of the Act of Parliament, and ſo I pray judgement for the Plaintiff.

The argument of Serjeant *Finch* Recorder of *London*.

LEinuage Finch Serjeant, and Recorder of London contrary: and after a Recital of the caſe ſaid, that I think judgement ought to be given for the Defendant, it is uſually ſaid, finis finem imponet Litibus, but here our fine had not that ſence, for that had been queſtioned in all the Courts of Weſtminſter, and now it is come to this Court, where we ought to have begun, for this is the proper Court to determine the right of inheritances, ergo ſperoſumus in Loco proprio; and therefore ſhall be at reſt: and the caſe upon this ſpecial verdict ſtands upon two points. Firſt, whether by the indenture and fine, the Lady Ceſar had gained the inheritance. Secondly, if ſhe had not gained the inheritance, whether ſhe had kept her firſt eſtate, and for the firſt there are three pertinent points moved by my brother Crawley, to which I will add a fourth. Firſt, whether the words make a precedent or ſubſequent condition. Secondly, whether the death of Robert had diſcharged that, and that is become impoſſible. Thirdly, admit that this is become impoſſible, whether the uſe will ariſe to the Lady Ceſar, and I hold that it will ariſe to the Lady Ceſar. Fourthly, whether any notice is requiſite: and here firſt by the way, whether an infant may limit the uſes of a fine, I will not argue that, for ſo it is reſolved in Beckwiths caſe; and ſo is it cited in Mary Portingtons caſe to be adjudged, and there was one Lewes caſe 26. Eliz. before Wray and Anderſon, and the reaſon is apparant, that when the law had adjudged by inſpection, him to be at full age when he levies a fine, he ſhall never come after the fine is levied, and ſaid that he was within age at the time of the limitation of the uſes; nay, I will cite one caſe to ſhew how cautelous and warie the law is in adjudging by inſpection: Poynts caſe, where an infant brought a writ of error to reverſe a fine, and day was given till Octabis Mich. to be adjudged by inſpection, and before the day the Term was adjourned till Menſe Michael. but between Octabis Mich. and Menſe Mich. he came of full age, and yet upon Octabis Mich. upon the Eſſoyne day Juſtice Crook took his inſpection de bene eſſe, and it was ruled, that now he may not avoid the fine, but he was forced to compound for the Land, and ſo the 6. Iac. was one Randals caſe, who reverſed a Statute by reaſon of his minoritie by audita querela, and the laſt judgement, for ſome error in that was reverſed, and then he brought a new audita querela, when he was of full age, and he cited all the proceedings upon the firſt, and adjudged that the audita querela doth lie, and ſo here, when the law inables him to levie a fine, the ſame inables him to declare the uſes; and now for the firſt point, whether this be a precedent or a ſubſequent condition, for that is the fair Helena for which we fight, and yet I agree with my Brother Crawley, that in ſome Caſes there ſhall be a tranſpoſition of Terms, and the parts in the propoſition, in ſome caſes (if) is a note of a ſubſequent condition, and for this the judgement of the caſe in Colthirſts caſe, where a remainder was limited ſi ipſe inhabitare vellet, and to be a ſubſequent

quent condition: and ſo I will not denie, but that if a man make a feoffment in fee, upon condition that if the feoffee pay 20. s then he ſhall hold to him and his heirs, it is no queſtion but the fee ſimple palleth; and it is a ſubſequent condition to reduce that; but ſecondly, this doth better agree with the intents of the parties, and for the firſt, the fine is levied to the uſe of the Conuſee, and the Conuſee is now in by the Common Law; but defeaſable upon condition afterwards. Secondly, the intents of the parties plainly do appear, that he ſhall have the land to the uſe of her and her heirs, if Robert do not pay 10. l. and if he doth, then to other uſes, now if no former uſe had been expreſſed by which this will reſult, thoſe laſt words will, and I ſay no mean uſe will reſult; but it ſhall be to the uſe of the Conuſee, and thoſe words for ever, though they adde nothing to the eſtate of Anne, yet they ſerve to ſhew the intentions of the parties, that if he do not pay, then it ſhall be to the uſe of Anne and her heirs, and if he paid, then that ſhe ſhould have that for life; but it is abſolutely againſt the intents of the parties, that ſhe ſhall have neither, and for that of neceſſitie to ſupplie the intents of the parties, this ſhall be a ſubſequent condition; like to the caſe where a man levies a fine to the intent, that the Conuſee ſuffer a recovery againſt him, now of neceſſitie to have the intents of the parties fulfilled, the fine ſhall be to the uſe of the Conuſee for this time, though none is expreſſed, for otherwiſe it would reſult, and ſo in this caſe, that the intentions of the parties may be performed, this ſhall be a ſubſequent condition. Mich. 22. Jac. C. P.

The reſidue of the argument of Serjeant *Finch*.

NOw for the ſecond point admit, that this is a precedent condition, whether by the death of Robert before the firſt of September, the condition is become impoſſible to be performed, becauſe that the letter of the condition is, that if Robert Foyn pay to the ſaid Anne &c. and I hold others are inabled in Law to perform that, and that Robert his heirs or Executors may pay that: and a thing which is implied or ſupplied by the Law is aſwell, as if it had been expreſſed, as between Corbet and Cottow 39. Eliz. a bond to appear ſuch a return of the Term at Weſtminſter, and the Term is adjourned before the day to Hartford, and ruled that he ought to appear where the Term is, and ſo in many caſes where the words are ſhort and curtailed, the law will ſupplie that: 41. Ed. 3. 17. a feoffment to two to infeof another, if one die, the ſurvivor may make that, and yet it was not ſaid that the Survivor may, and ſo is Brook joyntenants 62. and conditions 290. words in the Copulative may be taken in the diſjunctive, and there cannot be a more apt caſe, then Littleton fo. 76. where though there are the words of the feoffor, and the feoffee only; yet the heirs of the feoffor, or the feoffee of the feoffee, may perform that, for the words being ſo, the Law ſupplies them; and if there is any difference between our caſe and Littletons, then our caſe is the ſtrongeſt, for Littletons caſe are to defeat an eſtate which ſhall be taken ſtrictly, and if his caſe be taken ſo favourably, then much more in our caſe: and we ſee the words taken ſtrictly, when they are to defeat an eſtate, as that 3. of Eliz. a leaſe was made for years upon condition, that if leſſee do not pay, then that the leſſor or his Aſſignes may enter, and afterwards the leſſor granted the Reverſion, and now adjudged that the grantee may not enter, becauſe it failes of the word heirs in the reſervation of the condition, and for that reaſon the leſſor had but an eſtate for life in the condition, which he may not transfer to another, becauſe he had not fee in the condition; and there was a caſe adjudged Paſch. 41. Eliz. where a man was bound to infeof the obligee and his heirs, and in this caſe the obligee died, and the Executors ſued the obligation, and adjudged that they ſhall be barred, becauſe he made an eſtate to the heirs of the obligee, and ſo is the principal caſe of the 10.

Mich. 22. *Jac. C. P.*

H. 7. and Dyer 14. where a man covenanted, that he will build a house, his Executors may make that, and so here it may be performed by his heirs, and therefore it is not discharged: and now for the third point, admit, that it is become impossible whether the use will arise: and I hold that it will arise, and in that I take this difference between a fine or feoffment, and an obligation upon condition to make such Acts, for the condition of the obligation is taken onely for the benefit of the obligors, and therefore if that do become impossible by the Act of the law the obligation is saved, but here the limitation of the uses, are the words of the Conusor, and therefore shall be taken more strongly against him; in which I put this case, if a man had two sons, and he do Covenant in consideration of natural affection, that if the eldest return from Rome by such a day, that then he will stand seised to his use, and if he do not return, then he will stand seised to the use of the youngest son; now if in this case the eldest die before the day, so that it is become impossible that he should return, yet that will not hinder the raising of the use to the youngest son; and so in Dyer 331. the limitter may not have any estate against his own limitation of his uses, for this is his own fact, and so in our case it is his own default to make such a limitation: and now for the fourth point, whether any notice is requisite to the heirs, and first I agree that in many cases, a man shall not lose a thing except he had notice; but there are two exceptions from this rule, upon which I will put some cases, and then I will applie them, and first the ordinary may present by laps, and he needs not to give notice, for its supposed in law, that the ordinary will in 6. moneths see whether the cure is served or no; nay, if the patron was a Purchasor, and a stranger present, he had lost his inheritance, and yet no notice ought to be given: and the 12. H. 7. if the Tenant of the Lord do die without heir, and a stranger do enter, and Abates and dies seised, now the Lord had lost the benefit of the escheat, and yet perchance he had no notice of that, and so was the opinion of Dyer and Welch 4. Eliz. that if two Copartners make partition, in this case, the Lord ought to take notice at his peril; and secondly, when one is bound to take notice at his peril as in Westby's case; the new Sheriff ought to take notice of the Execution upon the prisoners when he takes them, and so is the first of H. 7. 4. a man being bound to perform an arbitrement, he ought to take notice of that at his peril; but in our case here is a presumption in law, that he had notice, for he had the land from his ancestor, and in the same degree, and so the law doth intend, that he had notice of the conditions, and if he had not, it is the default of his Ancestor, that he had not left his deeds with him. Secondly, the heir is privie to the condition, this doth descend to him, and therefore he ought to take notice of that: and put the case, that an Action of debt is brought against the heir, upon the obligation of his father, and he pleads he had nothing by discent, and it is found that he had a reversion expectant upon a Term for life, of which he had not notice of, yet that will not excuse, for the law intends that he had notice, and that he shall be charged as if it were his own debt, and also the deed after the death of his Ancestor doth appertain to him, and if the deeds are kept from him, he may have an action for them, and besides, here no man is bound to give him notice, for if it should be given, it ought to be given to the heir, or to the Executors, for they may both save the land by the performance of the condition; nay, if there be 20. Coheirs, there ought to be notice given to them all, because they are to lose their inheritance by that, and it is not like to the case which was adjudged, where there are two obligors to make such an assurance as the obligee shall devise, there a devise to one is sufficient, because this concerns a personal thing, but otherwise when this doth concern an inheritance as here: but I relie upon the reason of the first forming of the deed, if I am not bound to give notice at the time of the making of the deed, I shall not be bound to give notice by any matter ex post facto: and yet I do agree that in many cases where a thing is certain at the first, and doth refer to some future agreement, that in such cases, there ought to be notice given to the partie, as Hill. 12. Iac. in this Court Rot. 109. where a promise was made upon

Cook 3.

upon a consideration, that the other will withdraw his suit which he had in the Exchequer; that then he will give to him so much when he came into Somersetshire, and adjudged that the partie ought to give notice when he came in to Somersetshire; but in our case every thing is certain at the time of the making of the deed 38. Assises 7. if a feoffment is made upon condition to regrant to the feoffor and his heirs, if in this case the feoffor do die, he is not bound to regrant to his heirs without a request; another reason is, who shall give notice to the Lady that Foyn is dead, she is bound to take notice of that at her peril, and also if the Lady had died, who shall give notice to the Executors, that they may attend to receive the money, for if they do not attend, this is a peremptory refusal; and for that reason it is equitie, that if no notice is to be given of one side, then there shall be none given of the other side; and so I conceive, that there doth not need any notice; and now for the last point &c. of the estate for life, whether if no fee do arise, whether she had lost her estate for life, and first this is no Forfeiture, for here he in reversion is partie; but it is said, that this is extinct, but let us examine, if this had been before the Statute of uses, no more use will result then was before, and for the estate for life that is saved, and it was resolved Trin. 5. Iac. that if Tenant for life grant his estate by fine to another, and yet he doth express no use, that it shall be to the use of the partie, because that the Law intends that by this it is disburthened of the danger of waste: but in our case, the estate of the Cousee is saved by the Statute of the 27. H. 8. for this saves all rights, titles, possessions &c. of those who shall be seised to any use, and so was it adjudged in Cheny and Oxenbridge his case, that the Term for years was saved, but the doubt in that case, was not whether a Term was saved which he had to his own use, but that which he had to the use of his wife, and adjudged that this was saved; and 32. Eliz. it was ruled in the Chancery, between Tates and Willers, that if he in reversion do infeoff lessee for years and two others, there it was ruled that the Term was saved, and so it was adjudged Trin. 17. Iac. Rot. 246. Francis Priors case, that where the lessee for years is, and he in reversion levies a fine to the lessee, to the intent that he suffer a recovery, here the Term is saved, and yet for the time the lessee was seised to his own use: but because that the fine was Preparatory to inable him to suffer the recovery; now in this case after the recovery suffered, that will look back to the first agreement of the parties, and so the Statute hath saved the Term: and for that reason, if the Statute do save a Term which is of small account, much more a freehold, and so he prayed judgement for the defendant, see more after.

Trin. 22. *Jac. C. P.*

The case of *Hilliard* and of *Sanders* entred *Mich.* 20. *Jac.* Rot. 1791.

Post, 121.

HIlliard brought a replevin against Michael Sanders for the taking of Beasts in a place called Kingsbury, and the Defendant avowed, and shewed, that Sir Ambrose Cave was seised in his demesne as of fee of Kingsbury, where the place in which &c. is parcel: and 14. Feb. 16. Eliz. granted a rent charge of 42. l. 8. s. 4. d. to one Thomas Bracebridg, and to the heirs of Thomas upon Alice to be ingendred, the remainder to the right heirs of Thomas, and Thomas had issue John, and Thomas died, and then Iohn his son died, having issue, Anne the wife of the Avowant, in whose right he avowed for the rent of half a year &c. 21. l. 4. s. 2. d. due at W. in Bar of which avowrie the Plaintiff pleaded that true it is, that Sir Ambrose Cave was seised of the Mannor &c. and he made the grant according, and that Sir Ambrose Cave died seised, and that the said Mannor descended to Mary his daughter, as daughter and heir to him, who was married to one Mr. Henry Knowles, and shewed that he was seised, and then shewed that the 12. Iac. it was agreed between the said Sir Thomas Bracebridg and Alice his wife

Mich. 22. *Jac. C. P.*

wife, and the said Henry Knowles and mary his wife, that for the extinguishment and final determination of the said rent, that Thomas and Alice should levie a fine to Henry and Mary of the said lands and Tenements aforesaid, by the name of the Mannor of Kingsbury, 300. Acres of land, and of divers other things, but no mention was made of the rent, and this fine was upon Conusance of right, as that which they had &c. and also they released all the right which they had in the land to Henry and to Mary, and then shewed that after the death of Mary, this land descended to two daughters, one being now married to the Lord Willoughby, the other to the Lord Paget, under whom the Plaintiff claimed, to which the avowant said by protestation, that there was no such agreement, and for plea, that the rent was not compriſed, and upon that it was demurred in Law: and now Serjeant Attoe this Term argued for the Plaintiff, and the substance of his argument was in this manner: Attoe said the case was, Tenant in tail of a rent charge, agreed with the Tenant of the land to extinguish that, and that he would levie a fine of the land to the land Tenant, which is upon Conusance of right, and upon release, which fine is levied accordingly: whether this cuts off the tail of the rent, and I hold that it will; and I do not finde any opinion in all the Law against this, but only the opinion of Thornton in Smith, and in Stapletons case in Plowden: which I do not esteem to be a binding authoritie: and the case is, Tenant in tail of a rent disseised the land Tenant, and levied a fine with proclamation of the same fine to a stranger, now said Thornton, this shall not bar the issue in tail of the rent, because the fine was only levied of the land, and he cited this to prove another case, which is Tenant in tail of land accepted a fine of a stranger, as that which he had &c. and he rendered to him a rent, and he said that his issue may avoid that rent, and this case I grant, because the rent was not intailed, but for the other case I openly denie that, and there is much difference between those two cases, for a fine levied of the land may include the rent as well as the land, but it is impossible that a fine of rent should include the land, and our case here is pleaded to be of the land, and of the rent, and a fine of the land may carry the rent inclusively, because it is a fine of a thing intailed; yea, it is not a new thing, that rent should be carried inclusively, by way of extinguishment in the case of a feofment, and then *à fortiori* in a fine which is a feofment upon Record, and especially when it is levied on purpose to extinguish the rent, and the Statute of fines is more strong, for that is of any lands, Tenements, and hereditaments any wayes intailed to any person &c. but this rent is an hereditament intailed to the person who levied the fine, and this which is carried inclusively is within the Statute; nay, if a man had nothing in the land, yet if it was intailed to him who levied the fine, this shall bar the estate tail for ever, as if Tenant in tail made a feofment to G. S. and after that he did levie a fine to a stranger of the same land, that in this case the issue shall never avoid this, and yet neither the Conusor, nor the Conusee had any thing in the land, and

Cook 3.

see for Archers case, where the issue in tail levied a fine in the life of his ancestor, and a good bar, and yet there he had but a possibilitie, and so was the case of

Mich. 19. Jac. Rot. 763. C. B.

Mark-williams, where all the distinctions were made, for Henry Mark-williams was heir apparant to his Mother who was Tenant in tail, and he levied a fine in the life of his Mother, and died without issue, and then his Mother died, and it was ruled, that this did not bar the sister heirs, because she may have that, and never make mention of her brother, but in our case, if the rent had been granted in fee, it had been no question, but that a meer release will extinguish that, and I think a fine with proclamation is as forcible to extinguish a rent which is intailed as a release is, for a rent in fee: another reason is this, is a fine directly of the rent, though this is by the name of land, and also this is upon Conusance of right &c. and also in that he released, and remised to the Conusees all his right in the said land, but a case out of Bendloes Reports may be objected, Tenant in tail accepted a fine of the land, and rendred that for life, ruled the issue is not barred: but first I do not allow this case to be good law, but if it be good law, the reason

is,

is, becauſe he accepted only a fine of the land, and for that it only extends to that and not to the rent, as if a man is ſeiſed of 3. acres, and he accepts a rent of two of them, which render of them all, this is void for one acre; and laſtly, by a feoffment of land by warranty a rent is diſcharged, 21. H. 7. and here I conceive, that the replication to the bar of the avowrie is not good, for his plea is, that the rent in this caſe is not compriſed, and that is a point in law, whether it is compriſed or no; for if we do take iſſue upon that, we ſhall draw the trial here from the Court to the jury in the Countie, which is not good, and ſo upon all the matter I pray judgement for the Plantiff in the replication. Mich. 22. *Jac. C. P.*

The argument of *Davenport* Serjeant.

DAvenport Serjeant to the contrary, and he ſaid, the caſe is as hath been recited, and the queſtion is, whether the rent ſo granted in tail is by this agreement of the parties, and by the fine of the land, whether it hath extinguiſhed the rent: and I hold this conveyance which only paſſeth the rent by implication, is no bar to the iſſue in tail within the Statute of fines, for where it is ſaid, that a fine was levied of the rent by the name of the land, and made no mention of the rent, this will not carry the rent, and yet I agree this fine to be a feofment upon record, and to be a bar againſt the parties who levied that, but not againſt the iſſue; if this had been before the Statute of fines, it is no queſtion, this had been no bar againſt the iſſue, for it is the expreſs book 13. Ed. 3. avowrie 12. and 26. H. 7. 4. Tenant in tail of a rent made a feofment in fee of the rent with warrantie, and there it is ſaid, that the warrantie did not extend to iſſue quoad the rent, but now our caſe is upon the Statute of 32. H. 8. which ſaith that a fine ſhall be a bar of my lands, Tenements, and hereditaments any way intailed, but yet I conceive that this requires that the fine be levied expreſly of that, and not by way of conveyance, and ſo the caſe of Smith and Stapleton by Thornton, who ſaid that this was granted to him to be law, which muſt needs be meant it was granted by the Court, or by the Councel of the other ſide, and the reaſon of that is, becauſe it ought to be levied of that expreſly, and there it is ſaid, if Tenant intail of an advowſon, do levie a fine of the nomination, that ſhall not bar the iſſue, and yet in effect that is the advowſon, and becauſe it is not levied of that expreſly, it is not good, and then for the precedent agreement that is indeed, that the fine ſhall be for the extinguiſhment of the rent, and what then will that prove, that the fine was levied of the rent, and here the writ of Covenant was not brought of the rent, and yet I agree that agreements which do lead uſes of fines, will qualifie them againſt the very nature of the fine, as the caſe of the Lord Cromwel and Puttenham in Dyer: but I do not hold the agreement will extend over the nature of the fine, and therefore this being a rent in groſs, it may paſs by the name of land, and the averment here is contrary to that which doth appear upon the Record, and then not compriſed is a good plea; but this ſhall not be tried by the Countrie, but by the Record; as 12. H. 7. 16. for it is only to inform the Court, that the partie had miſtaken the Law, and ſhall be tried by the Court, and not by a jury in the Countrie, as Attoe ſaid, and ſo upon the whole matter of the caſe I conclude my argument, and pray judgement for the Avowant: ſee after Hill. 22. Iac.

The

Mich. 22. *Jac. C. P.*

The reſidue of *Michaelmas* Term in the two and twentieth year of King *James*.

Ralph Holt and *Rand* againſt *Robert Holt*.

RAlph Holt and Rand were jointly, and ſeverally bound in an Obligation to Robert Holt, and he took out Proces againſt them by ſeveral Præcipes, and he had two ſeveral judgements, and took out two ſeveral Executions againſt them of one Teſt, (S.) a fieri facias againſt Rand, and a Capias ad ſatisfaciendum againſt Holt, and the queſtion was, whether the writs were well awarded, and whether when one is Executed the other is diſcharged, and Serjeant Crew urged 15. H. 7. 15. if after a Capias executed, he may not have a ſcire facias againſt the ſame partie, and he cited a caſe to be adjudged in the 13. year of King James, between Crawley and one Lidcat, where two joynt obligors, and the obligee did ſue them, and had two ſeveral judgements againſt them, and he took an elegit againſt one, and a Capias againſt the other, and he who was taken upon the Capias brought his audita querela by which he was diſcharged of the execution, for in ſo much that he had taken an elegit againſt one, he is concluded to take any Proceſs againſt the other as well as againſt him, who had the elegit ſued againſt him, and ſo is Cook 1. 31. and yet ſome books are, if the fieri facias is ſerved for part, he may have a Capias for the reſidue, and ſo is the 18. Ed. 4. and 20. Ed. 4. 3. but here the fieri facias was executed for all, and for that no Capias ad ſatisfaciendum ſhall iſſue in this caſe: but Waller one of the Prothonotaries cited a caſe in this manner, that if a noble man and another be bound in an obligation as before, and the obligee had ſuch a judgement, as here in this caſe, he may have an elegit againſt the noble man, becauſe that the firſt Proceſs againſt him is by ſummons and diſtreſs, and he may have a Capias againſt the other, or a fieri facias; but Hutton denied this caſe, and ſaid, that he ſhall have the ſame execution againſt both; for as this ought to be one ſatisfaction quo ad ec. ſati factionem, ſo this ought to be one for the manner alſo, and though in this caſe, that the Capias was not well awarded; and Harvey Iuſtice agreed to that.

Sir Gilbert Dabenhams caſe.

Methol againſt *Peck*.

2. Ro. Rep. 476. Poph. 160. Hutt. 73. H. B. 156. 162. 3. Bulſt. 297. 1. Jon. 85.

METhol brought an action upon the caſe againſt Peck upon an aſſumption, and he declared that in conſideration, that the Plantiff would pay unto one Plaford 52. l. to the uſe of Peck ſuch a day &c. Peck promiſed to redeliver his bond in which he was bound in the ſaid ſumme, when he ſhould be requeſted to that; and he ſaid that he paid the 52. l. to the uſe of Peck, and that the ſaid Defendant had not delivered the ſaid obligation licet ſæpius poſtea requiſitus (fuiſſet,) and upon the iſſue of non aſſumpſit, it was found for the Plantiff, and now it was moved in arreſt of judgement, becauſe he had not ſhewed the day, and the place of the requeſt, but the Court &c. Hobert, Hutton, and Harvey were of opinion, that judgement ſhall be given for the Plantiff; and yet they agreed he might have demurred upon the declaration, and that was good, and alſo they held, if that had been generally ſæpius requiſitus &c. it had not been good; becauſe the requeſt is parcel of the promiſe, and therefore ought to be preciſely ſet down to be after the promiſe, and the payment of the 52. l. but here they ſaid, for the time it is very well

well expreſſed by this word poſtea, and there is not any defect but only in the place, for poſtea implies, that this was after the promiſe, and payment of the money; and Hobert ſaid, that all the points of the declaration quoad the ſubſtance are good, only it fails in the place where the requeſt was made, and this baried by the iſſue, and all the reſt is ſufficiently alledged to aſcertain the Court, that the promiſe is broken; and Hutton ſaid, that in his opinion ſuch a requeſt ought to be given in evidence; but Harvey ſaid, that though the requeſt is parcel of the promiſe, and that ought to be ſufficiently alledged, and ſo it was here, ſo that the Court may give judgement of that, and he ſaid, that poſtea requiſitus had relation to the time of the promiſe, and the payment of the money: and judgement was given accordingly for the Plantiff, in the ſaid caſe. Mich. 22. *Jac. C. P.*

Sir *John Davis* priviledge denied.

NOte that this day being the 26. of November, Davis who was the Kings firſt and chief Serjeant came to the Bar, and he offered to move the Court, and they refuſed to heare him, becauſe his courte was gone in his abſence, and he claimed his priviledge, that the Kings Serjeant might move at any time: but Juſtice Hutton anſwered that 20. years agoe, when he was made Serjeant, there was no ſuch cuſtome, or priviledge, except they moved for the King; and ſo ſaid Juſtice Winch alſo, and he ſaid, that though of late time ſuch favour had been given to them; yet that was ex gratia Curiæ, and this was an evil cuſtome, eſpecially now when the King had five Serjeants, and he uſed to have but two, and ſo they told him they would not allow of any ſuch priviledge, or prerogative, neither would they hear him upon any ſuch account, and they ſaid perchance of favour they might hear him.

Auſtin againſt *Beadle.*

AUſtin brought an ejectione firme of lands againſt Beadle, and declared of a leaſe made at Hayleſham, and the Defendant pleaded, that Hayleſham prædict. ubi tenementa jacent, is within the five Ports, where the writ of the King runs not, and ſo he pleaded to the juriſdiction of the Court, and the other replied, that the Town of Hayleſham was within the Countie of Suſſex abſque hoc, that it was within the five Ports, and upon that the Defendant demurred, and it was argued by Finch, that the traverſe was not good; and he ſaid, that he ought to have traverſed, abſque hoc quod villa de Hayleſham ubi tenementa jacent is within the five Ports, for the veritie was that it was part in the five Ports, and part in the Countie of Suſſex, and the land lies in that part which is in the five Ports; and for that he may not take iſſue upon that traverſe, for then it will be found againſt him, and ſo he ſaid it was held 50. Ed. 3. 5. that the Plantiff in treſpaſs there in his declaration and replication he diſtinguiſhed the part, and ſo the Plantiff ought here, but it was anſwered by the Councel of the other ſide, and reſolved alſo by the Court, that the traverſe is good, and that the Bar is naught, and if the Plantiff may not traverſe in other manner, and that the Defendant in his Bar, he ought to have made his diſtinction, and every plea which goes to the juriſdiction of the Court, ſhall be taken moſt ſtrong againſt him who pleads that, and the traverſe here ought to be to the Town, and not to ubi which was idle, for the law ſaid as much, and we do not imagine any fractions of Towns, and ſo I conclude the Plantiff ought to have judgement.

Mich. 22. *Jac. C. P.*

Aſhley againſt *Collins*.

IN a caſe between Aſhley and Collins, it was agreed clearly by the Court, that if an infant made an obligation, and after he being ſued upon that, an Attorney without warrant ſuffers a judgement by non ſum informatus, that this was no cauſe to grant an audita querela, and upon the opinion of the Court, the audita querela was quaſht, for it was ſaid, he ſhall have a writ of error if he were within age, and if he was not then he ſhall have his writ of diſcreit againſt the Attorney.

Anthony Gibſon againſt *Edward Ferrers*.

Poſt, 120.

ANthony Gibſon brought an Action of debt of 1000. l. upon an obligation made the 11th. of December 21. Iac. and the Defendant came and demanded Oyer of the condition, and the condition recited that, whereas there were differences between the ſaid parties, concerning ſome accompts, now they had for the final determination, of them they had put themſelves upon the award, and arbitrement of Gerrard de Malines to be made before the laſt day of December next, if therefore the ſaid Edward Ferrers his Executors &c. ſhall and do for his and their parts perform, ſtand to and keep the ſaid Arbitrement of the ſaid Gerrard de malines, that then &c. quibus lectis et auditis idem Edwardus dicit quod prædictus Antonius Actionem ſuam verſus eum habere non debet; becauſe he ſaid, that the ſaid Gerrard de malines did not make any Arbitrement: and the other replied and ſhewed an Arbitrement, which he did award to Gibſon intereſted to be paid for money among divers other things, and upon that the Defendant did demur in law, and it was argued by Bridgman Serjeant for the Defendant; that Arbitrement is void, for it is for the payment of intereſt; and I hold that Arbitrators who are judges indifferently choſen, may not award intereſt to be paid, for that is an unlawful thing, for all the Statutes which have been made concerning uſury, have branded that to be unlawful, and thoſe differences which are ſubmitted, ought to be intended to be lawful differences, and he cited a caſe in the Kings Bench, where an action upon the caſe was brought, upon a promiſe made upon conſideration, that if the Defendant will forbear the principal together with the intereſt, that he will pay that at a certain day; and it was adjudged, that the action lies, becauſe there was no certain intereſt ſet down; for he ſaid, if the certaintie of the intereſt had been ſet down the conſideration had not been good; and then if this thing be ſo unlawful that a man may not binde himſelf by his promiſe, then á fortiori Arbitrators may not award that; and for another reaſon it is void, becauſe that intereſt is awarded, for the time after the ſubmiſſion was made, and ſo I pray that the Plantiff may be barred.

Hendon contrary, I hold the award to be good; for though that ſhall be void for the intereſt, yet it ſhall be good for the reſidue, and then the non payment is a breach of the condition, for where an award is made for a thing againſt the law, and for another which doth ſtand with the law, this is good for one, and void for the others, ſo here. Secondly, this award is not for intereſt, but rather for the damage for the forbearance of the money; but admit that this were for direct uſury, yet that is not void; my brother Bridgman had cited a caſe where an aſſumpſit for uſury was void, I know well what the judgement was; for I was of Counſel in the caſe, and much was ſaid in that againſt uſury, and Glanvil was cited Lib. 9. cap. 14. which ſaid, that an uſurer did forfeit his goods; but that is to be intended of ſuch, who live by the common oppreſſion of the people; and there was not any precedent found where a contract for uſury was void: Noy, the 26. Ed. 3. 24.

3. 24. debt is brought for money given for uſury, and admitted, and the Statute of the 13. Eliz. and 37. H. 8. which were made againſt uſury, ſhall be frivolous, if ſuch contract ſhall be meerly void; for they made only ſuch contracts to be void, as were made for above 10. in the 100. and ſo I pray judgement for the Plantiff. Hill. 22. *Jac. C. P.*

An action upon the caſe was brought for calling one thief, and the other did juſtifie the words, and ſaid that he was poſſeſſed of a Heifer which was privately taken from him; and that upon ſearch he found that in the poſſeſſion of the Plantiff with his ears cut off, and marked with the Mark of the Plantiff, and it was ruled, that this was not a good juſtification, for the matter is not ſufficient; but he ought to have expreſly averred that the Heifer was ſtole from him, and accordingly it was adjudged.

Hillary Term in the two and twentieth year of King *James* in the *Common Pleas*. *Ante* 103.

+

2. *Dan.* 16. *p.* 12. 3. *e.* 27. *p.* 1. 114. *p.* 1. 772. *p.* 3. 1. *Jon.* 389. 3. *e.*

The reſidue of the caſe between Cooper and Edgar, and now this Term Serjeant *Crook* argued the caſe for the Plantiff, and after a recital of the caſe, he ſaid that the general queſtion is, whether the Lady Ceſar had any eſtate by this fine, or whether the old eſtate for life remains; for if ſhe had the one or the other, then it ſhall be againſt the Plantiff, and he ſaid the points which I will inſiſt upon are four. Firſt, whether theſe words do make a precedent, or a ſubſequent condition; for if the uſes do not ariſe till there be a failing of the payment, then it is on my ſide, but if the uſes do ariſe before, then indeed it is againſt me, and I hold that no uſe will ariſe till there is a default in payment; in which I will obſerve, that the words are all in one period, and one ſentence, and till the firſt of September the uſe wil remain in Robert Foyne; for here the ſame is voluntarie, and it is without any conſideration, and then what doth the Law ſay till the condition was performed, the uſe was in him and his heirs; the grand doubt is, whether (ſi) here made a precedent or a ſubſequent condition, and I hold that (ſi) is alwayes a note of a precedent condition, if it may ſtand with the law, and with the intentions of the parties, but if it doth croſs either of thoſe, then that is a ſubſequent condition, and yet I agree if (ſi) is annexed to an eſtate which paſſeth by liverie, then this is a ſubſequent condition, and the ſame if it be annexed to a grant which is executed, but if it is annexed to a grant which is executory, then that is a note of a precedent condition, and ſo is Bracton lib. 2. fol. 190. where there is an example, and the placing that firſt or laſt is not material; and in the caſe of an uſe which is executory as this is, there till the (if) is performed nothing will paſs; Plowden 172. nay, the caſe of 14. H. 8. by Brooks and by Brundwel, if I covenant that another ſhall have my land when he marries my daughter, no uſe will ariſe till he marrie her, and the caſe of Colthirſt proves my difference both the wayes, for the leaſe was made to Henry and his wife for life, the remainder to William ſi ipſe inhabitaret &c. and if he die in the life of Henry or his wife, that then it ſhall remain to Peter, there the firſt (ſi) is a precedent condition, for if he do not die in the life of them, then Peter ſhall take nothing by that; and to this purpoſe there is a notable caſe 13. H. 6. 7. where a man made two his executors, and if they do refuſe to adminiſter, then he made two others within 3. moneths after his death, and ruled that in the mean time they are not executors; and yet (ſi) was placed in the ſubſequent place there, and there was a caſe H. 33 Eliz. between Iennings and Cawman, where a man made his will, and deviſed his lands to his ſon for 3. years; and afterwards appointed, that if his wife whom he made Executrix did

Hill. 22. *Jac. C. P.*

not ſuffer him to injoy that for 3. years, that the ſon ſhall be executor, and the queſtion was, whether the feme was executor in the mean time, and there Anderſon ſaid, that this was a precedent condition; but the other Juſtices were againſt him, becauſe it was a thing of continuance, and there they agreed the caſe of Colthirſt, that the word ſi ipſe inhabitaret are a ſubſequent condition, becauſe it is a thing of continuance which may be infringed and broken every year; and there was a caſe in this Court 29. Eliz. Rot. 854. between Iohnſon and Caſtle, where a man deviſed his term to his youngeſt ſon, if he lived to the age of 25. years, and did pay to his eldeſt brother ſo much money, and agreed no eſtate paſſeth till the age of 25. years, and payment of the money, and the reaſon was, that a deviſe executory may depend upon a precedent condition, and ſo here the uſe is executory, and nothing paſſeth till there is a failing of the payment: like to the caſe of the 15. H. 7. where a grant is made upon condition, that if the Grantee perform ſuch a thing he ſhall have ſuch an Annuitie, there nothing doth paſs preſently, and ſo 21. Ed. 3. 29. where a man was bound in an obligation, not to infeoff when he came to the houſe of Anceſtor &c. vide the caſe, and here in our caſe, becauſe the condition is, that if he do not pay that, then ſhe ſhall have it to her and her heirs; therefore it is a precedent condition, and if the uſe had been limited to him if he marrie his daughter ſuch a day, in the mean time no uſe will ariſe, becauſe the limitation is to him upon a thing not executed, and this being all in one ſentence, no uſe will ariſe in the mean time; the ſecond point is, whether the heir of Robert Foyne may pay that, or is bound to perform, that then the law diſpenceth with that; for it is limited if Robert do not pay, and ſo it is perſonall to him, like to the caſe in Plowden, when a thing is reſerved to be made by the perſon of a man, no other man may perform that, neither the heir nor yet the Executor: as in Dyer 66. 8. H. 4. 19. 21. Ed. 3. 29. where the heir is not named, he is not charged, and 10. Ed. 4 12. 11. Ed. 3. 16. and ſo in this caſe, becauſe it is perſonally limited to Robert Foyn: and ergo if he do die, there the law will not compel the heir, and that is the reaſon of Littletons caſe, fol. 76. for there though the father Morgaged, and the ſon is not named in the condition; yet becauſe he had an intereſt in the condition, he may perform that, and ſo the caſe fol. 77. the feoffee of the feoffee may perform that, though it is annexed to the firſt feoffee only, and this is for the ſalvation and ſafety of his eſtate, and in the firſt caſe being in A. Morgage the law ſaid, that the heir ſhall not be prejudiced: but when it is a voluntarie Act, and in point of diſcretion to the father, there the ſon may not perform that, and here the law had prevented the father in the point of election, ergo it is diſcharged, and it is like to the caſe of the Counteſs of Arundel, where a thing is annexed to the perſon of a man, no other may perform it, and ſo here the heir may not perform that, for it is diſcharged by the death of Robert. Thirdly, admit that he may perform that, then the queſtion is, whether default of notice may not excuſe, and here the Lady was a partie to this condition in the indenture, and here the ignorance of the fact may excuſe, and when the law doth put a man upon a neceſſitie, there it will excuſe him as 44. Ed. 3. 61. and 50. Ed. 3. 39. and ſo the Law will not impoſe a neceſſitie of notice upon him.

The reſidue of the caſe of *Cooper* and *Edgar* by Serjeant *Crook*.

Ante. 103. Poſt 118.

2. Dan. 16. pl. 12. 27. pl. 1. S. C. 114. pl. 1. 772. pl. 3.

1. Jon. 389. S. C. 3. D. 219. pl. 3. 228. pl. 2. 2. Ro. Ab. 352. pl. 10.

But Crook ſaid, that he being heir is bound to take notice; but for anſwer to that I will cite you one expreſs caſe, Francis caſe Cook 8. for there the heir was not bound to take notice of the proviſo in the feoffment without notice given to him of it: Winch, that caſe directly complies with our caſe, and ſo Farmers caſe Cook 3. leſſee for years in poſſeſſion levies a fine, that doth not bar the reverſioner,

reverſioner, becauſe he continued in poſſeſſion at the ſame time, and he had not notice of that, and here if the Anceſtor had not died ſeiſed, there had been ſome colour that he might have had notice; and this differs from Littletons caſe, where the heir may pay the Morgage, that in that caſe he ought to take notice at his peril, becauſe he did not die ſeiſed: and ſee 4. Coo. 8. where land is given to executors to take the profits, there reſolved that default of notice doth not hurt them, but they ſhall hold againſt the heir: now for that laſt point, whether the eſtate for life is ſaved by the Statute of the 27. H. 8. or whether it is gone by the acceptance of the fine, and I think it is gone, and yet I agree, if it had been leſſee for years, it had been within the ſaving of the Statute, becauſe he is but a conduit pipe to convey that; but in our caſe when it is by limitation of the uſe, then it will not be ſaved, becauſe that it is by her own proviſion that the uſe is ſo limited to her, and ſo the law will not aid that; and by the common Law it is an expreſs determination of the eſtate: 1. H. 7. alſo the caſes of Tenant for years, being within the ſaving of the Statute doth in no ſort help this caſe, for it may well ſtand with the eſtate; but out of the freehold the uſes do ariſe, and beſides the law will not provide for him, who had not provided for himſelf: as 5. H. 7. 7. if a man made a gift intaile rendring rent, the Law will not raiſe any other tenure, and it is a rule in law, that a man ſhall not take an eſtate by implication, where he had expreſly limited an eſtate to himſelf, and to that purpoſe there was a good caſe Hill. 13. Eliz. between Richmond and Bowcher, where a leaſe was made rendring rent to the leſſor his executors and his aſſigns, and there the leſſor died, and it was ruled in that caſe, that the Executors nor the aſſignes ſhall not have that, nor the heir, for it was not reſerved to him, and in 16. Iac. one Farmers caſe, where ſuch a leſſee for years took a feofment with an intent to ſuffer a recovery; but he continued in poſſeſſion two terms after, before he ſuffered the recovery; and yet it was adjudged the Term for years was ſaved: but here he being Tenant of the freehold, this may not ſtand with the limitation of the uſes: and ſo I pray judgement for the Plantiff.

Hill. 22. *Jac. C. P.*

Corbets caſe.

Cro. Eliz. 217. J. And. 261. Ow. 9. 2. Leon. 214.

The argument of *Davenport* Serjeant.

DAvenport to the contrary, after a Recital of the caſe ſaid, that he thought this to be a ſubſequent condition, for here are two uſes limited, and ſo there is two conditions for the firſt (if) if he do not pay this is ſubſequent, and the eſtate doth proceed; but the other is precedent, and the eſtate is ſubſequent, and the ſole difference when (if) makes a precedent, and when a ſubſequent condition is upon the words, for in this caſe words make the caſe, and if the eſtate is limited firſt, and then the condition ſeems annexed in words to determine that, in that caſe it is a ſubſequent; but if the Act is firſt appointed to be made, and then the eſtate is limited by expreſs words, there the eſtate will not begin till the tunc is performed; and ſo is the very difference 14. H. 8. 22. and there the principal caſe is adjudged to be ſubſequent, and upon that difference is 15. H. 7. and Coo. 7. where the eſtate is firſt limited, and then the condition is after that, and the meaning of the parties was, that the Lady ſhall have the fee if the other will not redeem that; and I deſired to be tried by no other caſes, then thoſe which my brother Crook had cited; Mary Portingtons caſe (ſi) is a proper word to determine an eſtate, and then the eſtate ought to be before; and for the difference between things executed, and things Executory under favour that is no difference, but that is as the words are placed; and I denie the caſe of Executors put by my brother Crook, and ſo I ſay it is a preſent eſtate, but it is defeaſable after by payment: but now for the ſecond point, whether it was diſcharged by the death of Robert, or whether the heir may

pay

Hill. 22. Jac. C. P. pay that, and I think that its impossible to avoid; Mr. Littleton and my brothers difference of Morgage is no difference; and Littleton saith, that the heir may perform that, because he hath an interest in the condition; and the reason is not, because he is charged, and so the case of the feoffee may perform that, and yet in both cases it is annexed as personally as it may be; and Sect. 337. no mention is made of the Morgage; but its in this case, if the condition had been that a stranger should pay that, then this is meerly personal: and so is Hill. 28. Eliz. between Waltham and Ashworth, if an heir is bound to perform a condition, then a stranger may not perform that, but any who had an interest as Gardian in Soccage, or Chivalry; and here by reason of the interest of the heir, by the non-payment he had broken the condition, for this is an hereditarie condition or limitation, by which the heir had an interest: now for the third point, whether he is bound not having notice; and I do conceive that, because the notice is ancestrel, and he was partie to that, and so there was an original notice upon the agreement which is also hereditarie, and discends to the heir; and that shall force him to take notice of that at his perill; but if it had been collateral to the father, there I grant that will not binde the son without expresse notice, as in Francis case: for there was not any Act by which the father was bound to take notice, and I desire no better case, then Sir Andrew Corbets case, Fourthly, the estate for life is not drowned by the common law, neither by the Statute, for it is grounded upon the Condition, and so there is not any Surrender in the case, and when an agreement is, that such a fine shall be levied, now that shall be understood to be meant only of the reversion, and he cited Sharingtons case, where Tenant for life levied a fine upon conusance of right, to him in reversion to the use of others, there because it might not appear to be otherwise, the estate of the Conusee was saved: and Farmers case where a lease was made to Farmer for years rendring rent, and after he bargained and sold the reversion for 41. years, and then made an indenture between the lessor, and the lessee, and one of the bargainees, that the recovery shall be suffered to the use of them and their heirs, and adjudged the reversion for years was saved: and so I pray judgement for the Defendant.

The argument of Serjeant *Finch* *Pasch*. 1. *Carol*.

114. p. 1. 772. p. 3. 2. Dan. 16. p. 12. 27. p. 1. S. C. 1. Jon. 389. S. C. Ante 116.

+

AND the following Term the case was argued by Henage Finch Serjeant of the King for the Plantiff, and he said, the first point is, whether this made a precedent or a subsequent condition, in which there had been much Logick used, and it had been said, that it is a rule in law, that when a state is first limited, and there are words of condition to devest, that in that case there is a subsequent condition which ground I will not denie; but I denie that here the estate is first limited, for though that seems to be in words, yet it is not in the intents of the parties, but here first I will note an ordinary difference in our books, that proviso and sub conditione are notes of a subsequent condition, (si) of a precedent condition, as appears by Mr. Littleton; and the reason of this difference is, because proviso and sub conditione make a full proposition, and so doth not the word (si;) and I compare that with Henry Finches case, where aut and alibi never begin a sentence, and so (si) never made an entire proposition: but the proposition is, that the fine shall be to the use of the Lady, if Robert do not pay, which is an Hypothetical proposition knit with a copulative conjunction, and then the antecedent ought to be (si,) for all doth depend upon that, but it hath been objected, that this is not an antecedent, for it is put in the last place, but I say put that where you will (si) will rule the sentence, and will have a construction in the first place; (S.) if Foyn do not pay 10. s. the first of September, then that shall be to the use of the Lady, and

and her heirs, and there are many cases, where (ſi) being ſo tranſpoſed will make a precedent condition 1.H.4.4. where the Judges will receive the Attorney of the vouchee if his Maſter will conſent, there he is no Attorney till he do aſſent 3. H. 6. 71. per Martin a man made another his Executor, if he will be bound to I. S. in that caſe before he is bound to I. S. he may not maintain an action as an Executor; and ſo by thoſe authorities 7. Ed. 3. 41. 14. H. 8. Whiſtlers caſe, and Dyer 159. now for the ſecond point, whether by the death of Foyn the condition is diſcharged; and I hold that it hath diſcharged that, and I hold Littletons caſe, where a day is limited, and where not will aid me: and I conceive that in many caſes, where Acts are not judicially annexed to the perſon of a man, yet they may be diſcharged by the death of the parties, if they are Collateral Acts; and put the caſe, that the uſe had been ſo limited, that if I. S. do not pay ſo much money before &c. now if I. S. do die before the day, it is no queſtion but that the condition is diſcharged; and alſo if it had been limitted in this manner if Foyn do not pay this to a ſtranger, ther by death alſo it is diſcharged, and the difference I conceive is, when the money is to be paid as a duty, and where as a penaltie, and this difference I learn of Mr. Plowden in the argument of Sir Thomas Treſhams caſe reported by the Lord Cook, and alſo by the Lord Dyer, and by Dyer it is ſaid, that ſuch a ſumme of money to be paid to the feoffes is not my duty, and therefore I ſay this Collateral Act is meerly diſcharged by the death of Foyn: and Littleton ſeems to implie ſo much, for in all the caſes of Morgages, he ſaith, that the Executor or heir may pay that, but when he comes to ſuch a feoſment made to the feoffee to pay money on his part, he ſaid, that if he alien the land the partie himſelf or the vendee may pay that, but not the heirs, nor Executors of the feoffees; and there was a caſe 18th. Eliz. in this Court, A. levied a fine to B. and his heirs upon condition, that if he pay ſo much to the ſon of A. when he comes to the age of 18. years, then to the uſe of B. and if not, to A. and his heirs, and the ſon died before the day, and the opinion was, that B. ſhall have that: now for the laſt point, whether the eſtate for life is gone, and I hold that it is, and here the agreement of the parties hinders the operation of the law, and that law will not provide for him, that provides not for himſelf, and the Lady her ſelf was partie to the limiting of the uſes, and ſhe covenanted that ſhe will be ſeiſed by vertue of the fine, and under the condition in the indenture, and ſo it is a plain Surrender of her former eſtate, and ſo I pray judgement for the Plaintiff. Hill. 22. Jac. C. P.

The argument of Serjeant *Hendon* to the contrary.

HEndon contrary, there are 3. points. First whether this be a precedent or a ſubſequent condition, and I conceive it is ſubſequent, and here the indentures being but to declare the uſes of the fine, and not to create any uſe, ergo it ſhall be guided by the intents of the parties appearing in them, and ſo is the Earl of Rutlands caſe Cook 5. and Dyer 357. and Shelleys caſe, and the meaning of the parties was not to raiſe any uſe to Robert, but only a poſſibilitie to reduce that by the performance of the condition, and firſt it is here ſaid, that the Conuſee ſhall be ſeiſed to the uſes hereafter expreſſed, and under the conditions, and then the uſe ought to preceed the condition, for no man may ſtand ſeiſed under the condition, except the condition is ſubſequent to the uſe to ariſe. Secondly, when is the uſe to ariſe to Robert, ſurely when he payes 10. s. and then in the mean time the uſe is to the Lady and her heirs, for tunc had here relation to, when as it is ſaid in Boles caſe Cook 3. and in Grants caſe cited in Loves caſe Cook 10. and 17. Ed. 3. 1. all which caſes prove that then had relation to when, and before this when he had nothing, and this doth appear to be the agreement of the parties; and now

2. D. 16. p. 12. 27. p. 1. 114. p. 1. 772. p. 3. 3. D. 219. p. 3. 228. p. 2. 2. Ro. Ab. 352. p. 10.

Hill. 22. *Jac. C. P.*

now for the words themſelves, I take it that they make a ſubſequent condition, and ſo it is here limited in intention, and for that in matter alſo; and it is ſaid in Colthirſts caſe in Plowden, that if the eſtate doth firſt paſs reducible upon condition, then it is ſubſequent, and here it is limited to the Conuſee and his heirs, if the Conuſor do not pay: but here it hath been ſaid is inverſio verborum, and the conſequent is placed before the Antecedent, and this hath been proved by Logick: I never knew caſes in law to be expounded by Logical and Grammatical learning, but by the intentions of the parties, and here I conceive that the eſtate is veſted in the Conuſee by the fine, and ſo the condition is ſubſequent: but admit it is Executory, and I ſay concerning that there are theſe differences; that if the ſtate of the thing granted is executory, and that the condition of the thing granted is Executory, and the condition is to remain with the eſtate, ſo long as the eſtate doth remain, the condition is precedent: 28. E. 3. 24. 3. 1. H. 6. 32. but if the condition be but one time to be executed, and that not contained with the eſtate, then it is ſubſequent 10. Eliz. Dyer Calthorps caſe: but here our eſtate is executed, for it is expreſly limited to the Lady Ceſar and her heirs, which takes away all implied uſes, ſo that no implied uſe ſhall reſult in the mean time, and ſo 75. Aſſiſes land given to a man and to his heirs, if he have heirs of his body, now this (if) is ſubſequent, and ſo I conceive that it is not a condition ſimply, but a conditional limitation, for it appears by Mr. Littleton, becauſe it is no otherwiſe expreſſed, and another reaſon is, becauſe the condition is annexed to the future time, ergo that is ſubſequent, and yet I grant there is a difference betwixt ſuch an eſtate conditional annexed to an intereſt, and where it is is annexed to an authoritie, it may be precedent, but for an intereſt it is ſubſequent, as is the caſe of Bracton lib. 2. fo. 3. and now for the ſecond point, whether the heir may and ought to perform that, and I do conceive that he is, and it is not annexed to the perſon, becauſe it is real, and doth ariſe with the land. Secondly, yet the law doth expect who ought to have performed that, but it is the performance it ſelf which the law doth reſpect: 4. E. 3. 2. ſuch condition real which doth ariſe with the land, and in ſuch a caſe no notice is in that caſe requiſite: and the laſt point is, whether the eſtate for life is gone, and I hold that it is ſaved by the common law of England, for the fine only is as the grant of the reverſion by the explanation of the indenture, and then there is no ſurrender in the caſe; but when the condition is performed, the eſtate for life doth remain, and ſo was it reſolved in Mr. Manſors caſe; and yet I agree that a litle matter will make a ſurrender; and Mr. Ruds caſe where leſſee for years of an advowſon, was preſented by the Patron, that was a ſurrender: but the Statute of the 27th. of H. the Eighth at the end ſaved that, though it is to her own uſe, for the words of the ſaving are to every perſon, and their heirs which hereafter ſhall be ſeiſed to any uſe all ſuch former rights, &c. poſſeſſion &c. as they might have had to their own uſe, in any lands whereof they be ſeiſed to any other uſe whatſoever: and ſo upon the whole matter I do conceive, that judgement ought to be given for the Defendant.

The reſidue of the caſe of *Gibſon* and *Ferrers*. *Ante*, 114.

NOw the caſe of Gibſon and Ferrers, which ſee before, was argued again by Serjeant Bridgman; and he ſaid, as before, the award is not good for the intereſt, and yet he now agreed that covenants, bonds, and contracts for uſury, are good in law, but yet it may not be awarded 17. Ed. 4. 5. if a man do ſubmit to Arbitrators, they may not award that he and his wife ſhall levie a fine, but if the partie himſelf do promiſe that, this is good, and ſhall binde the wife to perform that; and beſides he ſaid, that here is an award made only of one ſide, and nothing

is

is allowed to Ferrers, and so not good: 9. Ed. 4. 29. 29. H. 6. 22. and I pray that the Plaintiff may be barred: Hendon to the contrary: and he argued, if an award be good in any part, though it be not in that which is assigned for breach, yet it is good upon such plea of nullum fecerit arbitrium; and the other shews an award, and assignes the breach, in this case the breach is not traversable, for it is of the form, and not of the substance of the action: but to that the Court did presently answer, that the cause of the action is the breach of the award, and this he ought to make apparent to the Court, for otherwise he shall not have any action, and though the breach is not traversable, yet it is of the substance of the action, for upon such plea pleaded, he not only ought to maintain the award, but to shew the breach, for it shall be otherwise if it be found against him; and then Hendon answered to the other exception, that this is not for direct usury, but is rather for the damage, which he sustained by the forbearance of the money, and yet if it were for interest it is good, and then as to that which now had been agreed by my brother Bridgman, that contracts and obligations for usury are good: I say then by the same reason an award for that is good, for whatsoever a man may contract for, the same thing may be awarded; if the contract will bear that, and usury is not malum in se, but only malum prohibitum, and is good by our law, and here in this case, though the Arbitrator was deceived in the summe, yet after the award made it is altogether certain, and an implied recompence is sufficient in this case: but the Court said, that the casting up of the accompts did not make an award, for it is not a good Calculation, but the ending of the controversies that doth make the award, but yet the opinion of the Court in this case was, that the award was good, for an Arbitrement shall not be taken absolutely upon the bare words, and the Court did command the parties to come before them upon the morrow in the Treasury, and as it seems this was for mediation to make an agreement, for the opinion seemed to be for the Plaintiff. Hill 22. Jac. C. P.

The case of *Hilliard* and *Sanders* argued by the Court.

Ante, 109.

IUstice Harvey this Term did argue the case of Hilliard and Sanders, which see before; and after a brief recital of the case, he said that his opinion was, that the avowant shall not have return, because that by the fine of the lands the rent is extinct, and I am induced to be of this opinion by two things, the first is the agreement, and the other is the favourable exposition of the Statute of fines, to settle repose and quiet, and I will first shew the efficacie of fines at the common law; 21. Ed. 4. the Pryor of Binghams case, it is laid for a ground and rule in law, if a thing be contained in a fine either expresly, or implicitly, this is very good: and so is 44. Ed. 3. 22. 37. H. 6. 5. for a fine is no more then an agreement, and therefore it is called in latin Concordia, and then see if by any words you may pass this rent by the fine, and though the word rent is not there, yet if it be so infolded in the lands, that is good with that, it is very good, and for that 3. H. 7. 16. 17. 21. H. 7. proves that by a feoffment of the land the rent doth pass, and wherefore not by fine then, and this shall be within the Statute of 4. H. 7. and 32. H. 8. and a case may be out of the Statute of 32. H. 8. and yet be within the Statute of the 4. H. 7. as the 2. Ed. 3. in Dyer though the feme after the death of the husband she may enter upon the discontinues of the husband, yet if she do not within 5 years she shall be barred, and now you see that the construction of these Statutes was always to settle repose and quietness, for if such a construction should be made according to the opinion of Chornton in Smith and Stapletons case, then it will be mischievous, and for his opinion it was only in the way of arguing, and yet I conceive he had the good opinion of the Reporter, and without all questi-

Hill. 22. *Jac. C. P.*

on it is a caſe of as hard a conſtruction as that is of Archers caſe, where the heir who nothing had in the land in the life of his father, did levie a fine, this is a bar for ever, and the reaſon is, becauſe it is of a thing which is intailed, and he cited a caſe in Bendloes Reports, where a diſcontinuee was diſſeiſed by Tenant in tail who levied a fine, and the diſcontinuee entred, and then proclamations paſſed, that in this caſe the iſſue was barred; truly I do agree the caſe of 36. H. 8. that that a fine levied of land did not bar him who had title of Common, or a way, the reaſon is, becauſe there is no priviti, but in our caſe there is a priviti, and by Margaret Podgers caſe a Copiholder is within this Statute, and in our caſe the rent paſſeth eſpecially in regard of the agreement, as in the Lord Cromwels caſe, and he cited a caſe primo Jacobi, between Gage and Selby in an ejectione firme, where Gage was Tenant in tail, and he levied a fine to I. S. in fee, and after he levied another fine to the uſe of himſelf for life, the remainder over, and his brother brought a writ of error to reverſe the firſt fine, and ruled that he may not, for the ſecond fine had barred him of any writ of error, and ſo I conclude the fine had extinguiſhed the rent.

The argument of *Juſtice Hutton* to the contrary.

HUtton contrary, the fine had not barred the rent, in which I will conſider the nature of fines at the Common Law, and they were of mightie and great eſteem, and force, as appears by the great ſolemnitie which is uſed in them, as is preſcribed in the Statute of fines 18. Ed. 1. de modo *Levandi* fines, and he agreed that ſuch a fine by Tenant in fee ſimple will paſs that incluſively, for by the releaſe of all his right in the land a Signiorie is gone. I agree alſo that a fine is but an agreement; but yet it muſt work according to the nature of the thing; as upon a writ of Dealne, or of right of advowſon, a fine may be levied, and yet it is not levied of the lands, but of the advowſon, or Signiorie, and ſo if the writ of covenant be one thing, and the agreement of another thing, then it is not good, and firſt I will prove, that at the Common law fines have been rejected when the writ of covenant did not contain the thing of which the fine is to be be levied, and if at the Common law a fine was levied of rent, there ought to be a writ of covenant of that 18. Ed. 2. fines 123. and there the rule is given, that it is againſt reaſon to hold covenant of that which never was, and the rent there never was before, but ought to begin then, and yet it is clear a man may create a rent by fine; but he ſhall not have a writ of covenant of that when it was not in eſſe before, and becauſe the concord may not varie from that, therefore it was not received 38. Ed. 3. 17. Knevet put the rule, that a fine may not be of more then is in the writ of covenant, and when a fine is properly levied of that, it is by way of releaſe: Fitz. fine 100. and ſo I conceive here the rent doth not paſs. Secondly, here no man may plead that any fine is levied of this rent, for this is forced in by the name of land, which is abſurd, and contrary: and here is not any fine levied directly of the rent, nor any Silver of the King paid for that, but only by the judgement of conſequence: and now for the Statutes of fines, whether it is a fine within theſe Statutes, and I hold that it is not: and I am of opinion that if the rent had been behinde before all the dayes of proclamation paſs, and the iſſue had accepted, that he is remitted: and the ſame law is, if Tenant in taile of ſuch a rent, and he acknowledge ſuch a fine with proclamations, and the proclamations paſs, now if his iſſue had accepted the rent before the proclamations paſſed, he is remitted: and now for the Statute of 32. H. 8. that is not taken by equitie, becauſe it is a Statute of explanation, which regularly may not be inlarged: and ſo appears in Butler and Bakers caſe; and now for the agreement it ſelf that is not any thing, for this is

by

by a contrary name which may not be good: like to the caſe of the Lo. d Cromwel, Hill 22. *Jac. C. P.* for there was an agreement to raiſe a rent by fine, but here is an agreement to paſs a rent by another name, and will any man ſay that if a man agree to levie a fine of rent by the name of an advowſon, that this will paſs the rent; and I think that the caſe of Thornton is good law, and ſo is alſo the caſe which is put after that of the advowſon: and yet I agree if Tenant in taill do accept a fine with render to another for years, that ſhall bar him, becauſe that doth not work a diſcontinuance, but otherwiſe where it is for life, and ſo in my opinion the rent remains, and the avowant ſhall have judgement.

The argument of the *Lord* chief *Juſtice Hobert*.

HObert to the contrary, the ſhort queſtion is, whether the rent is extinct by the fine of the land, and I hold that it is, and it is agreed it is a bar againſt the parties themſelves, though not againſt the iſſue, and that being granted I ſee no ſecond reaſon wherefore the iſſue ſhall not be barred, and firſt I am of opinion, that this plea of not compriſed, it is not good; becauſe this fine doth work by way of releaſe, but it was ſaid at the bar, that things ought to paſs literally in a fine, which I denie, and alſo every informalitie of a fine which is cauſe to reject that, is not a cauſe to fruſtrate that when that is levied, and the words of the Statute are of any lands, Tenements, or hereditaments any wiſe intailed, and if there be any word in the conveyance which will carry that, it is ſufficient, and it ſhall be put upon the conſtruction of the law, and as to that, that the fine ſhall be according to the writ of covenant; but I ſay if there be no writ of covenant, then there is no departure: but it was ſaid, that the Silver of the King was not paid, which I alſo denie, for it was paid inclufively, and the words of the Statute are of any thing any wiſe intailed, and Tenant in taile had as great power to paſs that by fine, as Tenant in fee ſimple: and for the caſe of Thornton, I know he was a learned man, but let it ſuffice that he was ſo eſteemed; but for his opinion I do utterly denie that, and I do denie the caſe put by my brother Hutton of the Piſcary, for I hold if a man have a Piſcary in another mans land, and levies a fine of that by the name of land, this will paſs the Piſcary clearly, and ſo the ſame if a man have an office appertaining to land intailed, and a fine is levied of that by the name of the land, this ſhall bar the iſſue; and I denie that Statutes of explanation ſhall alwayes be taken litterally, for it is impoſſible that an Act of Parliament ſhould provide for every inconvenience which happens, and ſo the caſe of Godfrey and Wade adjudged, that the fine of the youngeſt ſon may not bar the eldeſt, and yet within the words the eldeſt was heir to him, but this word heir ſhall be expounded as his heir, and ſo we uſe to expound the Statute of 4. H. 7. which is an original Statute, and binds parties, and privies, and here the eldeſt brother is not privie, for he claimes before him: and ſo I conclude that the rent is gone: and judgement was given accordingly. *1. Jon. 31.*

Sir *Robert Hitcham* againſt *Brooks*.

SIr Robert Hitcham Serjeant of the King, brought an action upon the caſe againſt Brooks, and ſet forth in his declaration, that he was one of his Majeſties Serjeants at law, and that the Defendant ſpoke theſe words of him, I doubt not but to prove, he, innuendo Sir Robert Hitcham, hath ſpoken treaſon, and upon not guiltie pleaded, it was found for the Plaintiff, and now it was moved in arreſt of judgement by Hendon; firſt, becauſe it is not averred affirmation, that *Hutt. 75. S. C.*

Hill. 22. Jac. C. P.

he ſpake treaſon but he doubts not but to prove that, like to Penticoſts caſe which was adjudged here, where one Baker ſaid of him, I will prove that Penticoſt was perjured, and no action will lie, becauſe he did not directly affirm that he was perjured. Secondly, becauſe he had not ſhewed when he ſpoke thoſe words, and perchance it was in his infancie, or lunacie, or before the general pardons. Thirdly, here is not any allegation of any conference had of the King before, and the ſpeach of Treaſon is not Treaſon, but when there is an intent to commit that, and words ſhall be taken in the beſt ſence, as the caſe of Stanhop Cook 4. and ſo in the caſe between the Earl of Shrewsbury, and Sir Thomas Stanhop, one ſaid to Sir Thomas Stanhop, that the Earl is a ſubject; nay, ſaid Sir Thomas that is his grief, and adjudged thoſe words are not actionable, and yet the words might be taken as if he had repined to have a Soveraign, but the words were taken in the beſt ſence: Finch to the contrary; this is more then a bare affirmation, for he ſaid he doubted not but to prove that, aſmuch as if he had ſaid, I am ſure of that, and Mich. 16. Iac. Sidnams caſe, where one ſaid, I think in my conſcience that if Sir Iohn Sidnam might have his will he would kill the King, and all his good ſubjects, and adjudged upon a writ of error brought of that, the words are actionable: and ſo in Whorewoods caſe, ſo ſure as you beleeve that God rules the world, and that the King rules the Kingdome, ſo ſure did Whoorwood ſteal ſuch goods, and adjudged to be actionable; and yet perchance the partie to whom he ſpake, did not beleeve either of them, and ſo Woods caſe 18. Iac. I will call him in queſtion for killing of a man, I will pawn my ſhirt but I will hang him, and ſo here, and prayed judgement for the Plantiff.

Aſhley Serjeant contray; words which may be taken in a double ſence ſhall be taken in the beſt ſence, and it ſhall be intended he ſpoke Treaſon in putting of a caſe, or in ſpeaking that after another, and yet he offended not; and ſo if he had ſaid, that he had written, or printed Treaſon, for ſo do the printers of the King, and the Clark of the Crown; and ſo I conceive that the Plantiff ſhall not have judgement.

Easter 1. *Carol.*

And Serjeant Bawtrey, the Term following argued for Serjeant Hitcham, that it was plain, that the Defendant ſpoke the words with a full intent to take away his life, and to ſpeak Treaſon is to ſpeak ex corde ſuo, and not that which another ſpake, and now in Easter Term 1. Carol. judgement was given for the Plantiff by Hobert, Hutton, Harvey, and Crook with one accord: and they ſaid the limitation of the time is not material, for if it was ſpoke in his infancie &c. Brook ought to have ſhewed that: and Crook cited Walgraves caſe 32. Eliz. in B. R. one ſaid of him that he was not a good ſubject, and adjudged, becauſe he ſpoke them maliciouſly, and he being one of the privie chamber, that the action will lie, and ſo 5. Iac. Blanchflower and Alwood thou haſte ſpoke Treaſon, and ſhall be hanged for that, adjudged to be actionable, and the 7. Iac. Barford againſt Prowſe, thou haſte ſpoken Treaſon, and I will prove that, adjudged to be actionable; and judgement was given for the Plantiff according.

1. Dan: 94. pl. 16. S. C. Yel: 107. S. C.

Pleadal againſt *Goſmore.* Ante, 67.

1 Ro. Ab. 879. pl. 5. Hut. 67. 3. D. 283. pl. 4. 5.

Pleadal brought an action againſt Goſmore for the taking of his Colt, and fettering him by which the Colt was much the worſe, and the Defendant juſtified, and ſhewed that the Colt was taken within ſuch a Mannor which was the Counteſs of Hartfords, and that ſhe had eſtrayes within the ſame Mannor, and he juſtified the taking as Bailiff to her; and ſhewed that he fettered him to the

end

end to keep him from doing harm, becauſe he was wild: and Serjeant Attoe demurred in law, and he ſaid that a man may not fetter an eſtray, becauſe he ſhall be paid for his keeping, and for the hurt that he did; and he cited a judgement 8. Iac. in this Court Rot. 1749 between Harvey and Blacklock, for the taking of his horſe, and the fettering him by reaſon of which he fell into a ditch and was drowned, and the other juſtified the taking as an eſtray, and he fetred him to one of his own horſes, becauſe he was wild, and they both fell into a ditch, and were drowned &c. and adjudged to be no Plea, and the reaſon which the Lord Cook gabe was, becauſe he ſhall be paid for the keeping of him, and for his damage, and of this opinion was Hobert in the caſe at the bar: but Winch, Hutton, and Harvey contrary: that he may fetter him as he may his own horſe, and for the caſe which was alledged, they ſaid that there was no proclamation pleaded, and ſo the juſtification was not good, and judgement was entred for the Defendant: and this was the laſt caſe that ever Juſtice Winch ſpake to in the Court; for he being a man not more admired for his profound learning, then he was reverenced for his pietie and integritie died upon Friday following, being the fourth day of Februarie in the morning as he was making readie to go the Hall. Hill. 22. *Jac. C. P.* *1. Brownl. 286.* *3. D. 282. p. 3.* *284. p. 1.*

Elizabeth Davis againſt *Hawkins.*

There was a caſe between Elizabeth Davis and Hawkins in the ſpiritual Court for defamatorie words, and ſentence was given againſt the Plaintiff who appealed to the Arches, and judgement was given for the Plaintiff, and 12. l. coſts, and then came the general pardon, and the Defendant did appeal to the deligates, and there the ſecond ſentence was affirmed, and greater coſts given, and the Defendant did plead the general pardon, and they would not allow of that; and now it was moved for a prohibition, and theſe points were debated by the Councel, and agreed by the Court &c. by Hobert, and by Harvey; that though this ſuit and ſentence is only for to make the partie to denie the words, and confeſs his fault in ſome publick place, yet it is in effect, as if it were meerly at the ſuit of the King for reformation, and this is a new invention which they had found out, to take away the benefit of the pardon of the King, and now to the new coſts which were taxed by the deligates, they were not taken away by the pardon, for though the firſt offence was, yet becauſe this new ſuit was not only to quaſh the ſentence for the offence, but alſo for the coſts, ergo theſe new coſts were aſſigned for the unjuſt vexation, for he was the cauſe of the removing of that; and ſo they may do for the unjuſt vexation; but not for the firſt offence.

The End.

A Table

A perfect Table of the Principal matters contained in this Book.

A

ACcompt againſt a Bailiff, to the damage of 100. l. and judgement to accompt, he makes default, what judgement ſhall be given: 5.

Accompt what is a good Plea in bar therein, 9

An action upon the caſe where a requeſt, and the time and place thereof neceſſary, and where not, 2

Action for ſaying the Plantiff is a falſe for-ſworn knave, and took a falſe oath at a Commiſſion, 2 & 3

Action for ſaying, thou art a Thief, and haſt ſtolen 20. load of my furzes, lieth not, 3 & 10

Action for &c. thou haſt ſtolen Hay from Mr. *Bells* Racks, and judgement for the Plantiff, 6

Action upon the caſe upon a promiſe, what is a good conſideration, a quaint difference taken, 7 8

Amendment of a judgement, where, and within what time: good matter 8 9

Award where good in part, and void for the reſt, 1

Action for words, that the Plantiff ſtole Tobacco out of his Mrs. ſhop not good, without averring that there was Tobacco there, 15

Attachment denied upon an affidavit, 15 16

Audita Querela where it lieth againſt one Feoffee, and where before an Ouſter, 20 23

Action upon a promiſe what conſideration is good therein to forbear, 22 23

Action upon the caſe for procuring the Plant. to be indicted for ſtealing Vetches, where it lieth, and if it ought to be a writ of conſpiracie, 28 54

An action by an Auditor for ſaying, you are a Cozner, and live by Coznage, 33 39 40 41

An action for ſaying the Plantiff loaded a ſhip with Barley, and ſtole 7. quarters of it by meaſure, it lieth, 41

Avowrie for rent granted to the father, and that it was arrear to his ſon, good without ſaying in whoſe time it was arrear, 48

Action upon the caſe to ſave the Plantiff harmleſs for keeping a priſoner, good, without ſaying he was lawfully arreſted, 48 49

In avowrie for rent upon a leaſe by the father, the ſon claimeth by diſcent, the Plantiff ſaith the father deviſed the reverſion to another, the jury found a deviſe only of two parts, judgement given for the Avowant, 49 50

Amendments not allowed upon indictments, actions popular, or penal Statuts, and if one be named in the *venire facias*, *Gregory* is returned *George*, there needs not amendment if it be in a *Tales*, otherwiſe in a principal pannel, 66

Action for words, he is as arrant a Thief as any is in England, the Plantiff needs not aver, that there are Thieves in England, for the difference is when the words relate to a particular place, and when to an intire Realm, and ſo when it is tied to one kinde of fellonie, 70 89

Action upon the caſe where it lieth for a malitious proſecution at the Seſſions, 73

An action by the Obligee for the Obligor saying he had forged the bond, but if he had said to another, that he was a forger and had forged false writings, no action lies, 76

Action upon the case, upon a contract in London, to Table with the Plantiff at A. in N. and he then and there assumed to pay 4. s. by the week, where the action must be brought, 78

An action upon a promise against a Parson, in consideration that the Plantiff would better his Tithes by Planting hops, that he would allow him 40. s. an acre for his charge, if that be a good consideration, 80

Action upon the case where it lieth against an Attorney for covinous pleading, 90

Action by an Attorney, for saying, he had forged writings, and deserved to lose his ears, lieth not: 90 91

An action against a Sheriff, whether it lies in the Countie where the return of the extent was made, or where the land lies, 100

Averment against the Sheriffs return, where good and where not: 100

Amendment where the *venire facias*, *habeas Corpus*, and the pannel agree, but the Jury Roll differs: 101

Action of the case upon a promise: 101

Action for saying the Plantiff stole a ring, and had been hanged but for me, lieth: 102

Action upon a promise where the time and place of the request ought to be expressed: 102 103 112 113

Arbitrators (amongst other things) award interest mony, whether good for all or part: 114 120

Action by Serjeant *Hitcham* for saying, I doubt not but to prove Sir *Robert Hitcham* hath spoken Treason: 123 124

B

A Bail where he is not liable to the judgement until default be in the principal, or if the principal die: 61 62

C

A Commission to 4. or 2. of them, and one refuseth, the other sit, the 4th. may be a witness: 45

Condition to save harmless, he plead in the affirmative, he must show how: 9

A Coppiholder releaseth to his Companion, it is good without admittance: 3

A Coppiholder where he may inclose, or dig for Marle, and where not: 8

A Covenant to injoy without the let of the Grantors &c. or by their procurement: 4

A Custome for a Coppiholder to cut trees at his pleasure is void: 1

If Tenant in antient Demesne devise his lands, the Devisee shall have fee: 1

Covenant. See fine:

Costs where they shall be given against an Administrator: 11

A Condition to surrender coppihold, he pleads he did it, not good because he shewed not when the Court was holden: 11

A Commission to seise for recusancie, they seise an advowson, the King grants to I. S. who presents and is disturbed by the Universitie of Oxford, to whom the presentation belongs: 11 12 13

Costs upon a Nonsuit at a *nisi prius*, whether assessible by the Court, or by the Judge of Assize: 16

Common claimed to 600 acres and certain Messuages and lands, and that he was disturbed by digging common Borrowes, and doth not say he was seised at the time, much good matter: 16 17

Custome of Merchants in Bills of Exchange, varietie of good matter: 24

Condition to free the land avoidance from incumbrance, the Grantors heir presents, if that be a breach: 25

Custome to have a widdowes estate, and the husband is attainted, if it holds: 27

Condition that I. S. shall levie a fine to the Obligee who sued not a writ of Covenant, the Plantiff replies that before &c. I. S. had made a feofment of &c. whether the Obligee must sue a writ of Covenant. 29 30

A Condition contingent where extract by release: 30 31 54 55 56

Covenant to make assurance by advice, so that it be within *Norfolk* or Citie of N. a fine is advised, not good, because not shewed where it should be levied: 32 33

Covenant not to alien an advowson without assent, the Plantiff saith he had alienated &c. good, although he had not said by deed: 34

Covenant where it raiseth a present use, and

and where not: 35 36 37 59 60
Cuſtome touching Marchants and nationall lawes: 52
Church ſhall be repaired by him who hath land there though he be no inhabitant, but not lyable for the ornaments thereof: 53
Coppiholder what act by him will make forfeiture: 62
Covenant by a draper againſt his apprentice for defrauding him, the Defendant pleads the Statute 5. *Eliz.* and that thereby there ought to be a certificate that his father had 40 s. *per annum* freehold which was not done here: 63 64
If a Coppiholder ſels his land to a Leſſee of the Mannor it is good: 67
Condition in a Will where nothing veſteth till it be performed: 69
Coſts not to be paid where the Plantiff miſtakes his action: 69
Covenant brought by an Executor, the Defendant pleads giving of an horſe in full ſatisfaction which the Teſtator accepted: 76
A Court of equitie if it doth decree againſt a *maxime* in law, as benefit of Survivorſhip, a prohibition lieth: 79
Covenant that he was ſeized of a good eſtate in fee and had good authoritie to ſell, and that no reverſion was in the King &c. 91 92 93
Condition, where it ſhall be precedent, and where ſubſequent: 105 106 107 108 &c. 115 116 &c,
Coſts not diſcharged, although the offence be pardoned: 125
Commendam. See King:

D

INdept, after imparlance, alwayes ready is a good Plea: 4
Diſtreſs gone as to the *nomine Pœne* if the rent be expired: 7
A Declaration where it ſhall be mended in matter of ſubſtance: 20
Damages where good in part eſpecially after verdict: 27 28
Debt againſt an Adminiſtrator who pleads outlawrie in the inteſtate, no good Plea: 33 58
A man ſoweth land, and deviſeth to I. S and dies before ſeverance, whether the deviſee, or Executor ſhall have the Corn: 51
A Deviſe for years, if an entrie by him muſt be pleaded: 53
Declaration ſee new aſſignment.
Dower a Tenant pleads a fine levied by her husband and that the wife had not claimed within the Statute 4. H 7. ſhe replied ſhe brought a writ which abated, and this writ now brought was by *Journeys* accompts: 66
Debt for rent muſt be brought by a privie in eſtate only where the land lies, otherwiſe of a Privie in eſtate and contract: 69
Debt upon a bond the Plantiff ſaith he had not paid the money and did not ſay, nor any part thereof, good, for that muſt come of the other part to ſhew: 72
Debt upon a bond to perform an award, the Defendant pleads no award, the Plantiff maintaines the award and the breach, the Defendant rejoyned that before the time of the award they diſcharged the Arbitrators: 75
Debt by a ſervant for wages in the *debet* and *detinet*, and for 2 ſhirts in the *detinet* only, good without ſhewing that it was according to the Statue, and by ſeveral precipes in one writ: 75
In Dower the Tenant pleads never ſeized to have Dower the husband having an eſtate but by diſſeizing which was avoided by entrie: no Dower: 77
In Debt two were bound for the appearance of annother, and judgement againſt the debtor, who upon the *capias* offers his body, the Plantiff refuſes, the ſuerties are diſcharged, but the Plantiff may take a *Capias* within the year, but if he had come on the *capias* and had not Suerties, and he refuſed him, Quer. if he be not diſcharged: 77 78
Dower of a reverſion after a leaſe for years, ſhe ſhall have the rent, and the Defendant pay no damages: 80
Dower, what judgement ſhall be given, where the vouchee dieth, whether abſolute or conditional: 81 88
Dower, where the trial ought to be by witneſſes, and in what manner: 82
Dower, the Tenant pleads, that the demandant had entred, and diſſeized ſince the laſt continuance: 90
Where the Demandant ſhall have judgement, and where only a *petit Cape*: 90
Dower, againſt an Infant who pleads a deviſe to the demandant in ſatisfaction of

Dower and entrie : 100

E

ERror lieth not for a judgement given in the Stanneries in *Cornwal* 8
If an Executor be nonſuit he ſhall pay no coſts 10
Executor where he bringeth an action he ought to ſhew the Will, otherwiſe if the iſſue be joyned 19
If the Debtor makes the Debtee Executor, he may retain, and plead fully adminiſtred 19
Execution, what fees are due to the Sheriff where the debt exceeds 100. l. 21 22
Eſſoign, in a Formedon after the Vouchee appeared 34
Eſcape againſt the Warden of the Fleet, retaking upon freſh ſuit good after an action, but not after iſſue joyned 35
Eſcheat where lands are given to a Monaſterie, and all the Monks die, who ſhall have it, the founders, or the Lord of whom it is holden 38
Executor where he or a deviſee ſhall have the Corn 51
If an Executor waſte the goods of a Teſtator and dies inteſtate, his Adminiſtrator ſhall be liable, and by the Court 31 *Ed.* 3. *Cap.* 11. gives no remedy but againſt an immediate adminiſtrator 65
Eſtray whether the partie may fetter him or no 67 68 124
An Executor where compellable to plead a general iſſue, and give the ſpecial matter in evidence 70
Executor may bring an action in the *debet* and *detinet* upon his own contract 80
Executor, an action brought againſt him by *Journeys* accompts, where good 82
Execution, where the partie ſhall be diſcharged by *Superſedeas* at the Courts diſcretion 100 101
Execution ſee purchaſe 112

F

TEnant for life, and he in remainder in tail Covenant to levie a fine, Tenant for life dies, if he in the remainder, ought to do it 4
In a *Formedon* the Tenant pleads, that at the day of the writ the Plantiff was ſeiſed of the moitie thereof, not good 23
Fees where an action of the caſe lieth for them by a Sollicitor 53 54

G

GEneral iſſue where it ought to be pleaded, and where not 70

H

HErriot whether it be due to the Leſſee of part of the Mannor, or to the leſſee of the whole Mannor 46 47 57

I

INformation for ingroſſing a 100. Quarters of Corn, and upon inquiry he is found guiltie of a 100. it is good for ſo much 5
In an *idempnitate nominis* the Plantiff prayed a *ſuperdeas* to ſtay Execution, *Curia Adviſari vult* 6
Information, for entertaining his apprentice without a Teſtimonial contrary to 5 *Eliz.* 25
Joynture the father makes a feofment to the uſe of himſelf for life, the reverſion to his ſon and his wife intail, this is no Joynture, though the father die in the life of the ſon, ſo if it had been for years 33
Infant and Apprentice unto what Covenants lyable 63 64
Iſſue, in a *quare impedit* is joyned, the wife one of the Plantiffs dieth, before the *venire facias*, the writ doth not abate, becauſe it was a Chattle veſted in her husband 73
Infant, where he may declare uſes upon a fine, and what acts are by him void, or voidable 104
Infant, in a judgement againſt him, where he ſhall be relieved by *audita querela*, or error, and whether againſt the Attorney who ſuffered it 114

K

VVHere the King may ſeiſe without office and where not 9
Where an uſurpation gaineth an advowſon from the King 14
King, where he hath title to preſent, the incumbent being created a Biſhop in *Ireland*, and what act is a diſpenſation thereof, and where a *Commendam* is well granted

ted and the ſeveral kindes thereof 94 95 96 97 98

L

A Leaſe of a rectorie excepting the Gleab, void otherwiſe if parcel of the Gleab 23

A Leaſe for a year, and ſo from year to year, this is a Leaſe for 3. years, and if the Leſſee hold over, *Quer*, what remedy for the rent 32

A Leaſe for years by him in remainder in tail, if deſtroyed by a recoverie 41 42 43

In a leaſe to trie a title of ſeveral parcels he ought to enter into them all ſeverally 50

M

A Miſs-trial is not aided by any Statute of Jeoffales 69

N

NUſance by ſtopping the winde, abated 3

Nuſance for ſtopping a light, abated 4

Notice to give bond where neceſſarie and where not 26 27

New Aſſignment if it be more large then the declaration, it is good in Treſpaſs, but otherwiſe in an *ejectione firme* 65

Notice, where ought to be taken and by whom 108 120

O

ORdinary, what power he hath to diſpoſe after debts and legacies paid 11

An Obligation where good upon the Statute 23. *H.* 6. 20 21 50 51

P

A Preſcription to pay the Vicar a Buck in Summer, and a Doe in Winter for a Park which becometh Diſparked 144

Preſcription to have land it ſelf, void 6

Preſcription, See Replevin.

A Prohibition to the Admiraltie lieth not after judgement given there 8

Proteſtation where good and where not 13 14

Prohibition where it lies to the Court of Audience for ſaying, thou art a common and baſe Quean 14 15

Promiſe by a Leſſee or a ſtranger to pay rent, if an action lie thereupon 15

A Preſentation by the Lord Chancellor, where it belongeth to the King is only voidable 19

Prohibition where it lies for a ſeat in the Church, a difference between the Lord of the Mannor and another Perſon 19

A Protection from a Peer not good in a *Capias utlagatum* 24

A Prohibition where the parties agree in the *modus*, but varie in the place of payment lieth not 33

A Prohibition awarded againſt one who ſued in the Court of Audience Adminiſtrators for a Legacie as Executors 64 65

In a prohibition the Tenants of a Dean and Chapter alledge preſcription for non-payment of Tithes, and good, becauſe they are a ſpiritual bodie 65

In a Prohibition upon a ſuit for a Legacie, the Executor ſhewed he had not aſſets to pay the debts, and the ſpiritual Court would not allow that allegation, yet no Prohibition 78

Prohibition to the Marches of wales, becauſe a *Legatee* ſued there for 500. l. good before a decree, but not after 78

Prohibition, ſee Court of equitie &c. 79

Prohibition to the Marches of Wales for requiring an accompt of an Adminiſtrator 103

Proces againſt two Obligors by ſeveral *precipes* and thereupon ſeveral Executions, whether the writs are well awarded 112

A *parco fracto* where it lies againſt the Lord of the Soil, and where not, except the Cattle come out 80 81

Prohibition to the *delegates*, a pardon not allowed of there 125

Q

IN a *Quare impedit* adjudged that nothing ought to be queſtioned after induction, the ſpiritual Court there 63

R

TEnant in tail ſells to *I. S.* in fee, who ſells to the heir of Tenant in tail being of full age, the father dies, if the ſon be demitted 5

A replevin &c. the Defendant ſaith that all thoſe &c. had uſed to have paſturage in &c. when it was not ſowed, the Preſcription is good 7

In a retnrn of Reſcous there needeth no addition 10

Replevin for rent iſſuing out of ſix acres, the avowant muſt prove that the grantor was ſeiſed of 6. acres or more 15

Replevin in the Plantiff claimeth propertie without that the propertie was in the Defendant, the Traverſe not good, yet judgement for the Plantiff becauſe after verdict 26

In Return of an extent by the Sheriff, ſurpluſage hurteth not 27

Replevin the Defendant avowed for homage, and ſhewed not how it was due, if good 31

Replication although evil, where the Plantiff ſhall have judgement if the Defendants plea be vitious 37

A Riotous quarrel about an arreſt between the Sheriffs Bailiffs, and the Bailiffs of the Marches of Wales 72

Releaſe an avowrie not good without pleading it by deed 72

A Rent-charge granted and a Covenant if it happen to be behinde, then the land to be alwayes open to diſtreſs, whether this be a diſtinct covenant or not 74 87

Replevin for rent, the Defendants ſay, that the land was parcel of a Chaunterie which came to the *King* by the Statute, wherein the right of others was ſaved, the Plantiff replies that the land is out of the fee of the Defendant, no good plea, but he might have Traverſed the Tenure, that at the making of the *Statute* the land was not holden of him 77

A Record amended, where the bargain and ſale and deed of uſes, were by the right name, but the writ of entrie was of another name 99 100

Rent granted in fee, by Tenant for life, and him in remainder in tail, levied a fine a good grant 102

Rent-charge whether it be extinct by a fine of the land to the Ter-tenant, and a releaſe unto him 109 110 111 121 122

S

SCire *facias*, the Defendant pleads a feofment, the Plantiff traverſes and the jury found a feofment to other uſes, whether this ſhall be intended the ſame feofment which was pleaded 32

Scire facias by an Executor upon a judgement for the Teſtator, the Defendant cannot plead the Teſtators death between the verdict and judgement, but he muſt bring a writ of error 48

Simonie, a grant of a next avoidance for monie, the Parſon being readie to die, is Simonie 63

A Sheriff by force of a *Capias utlagatum*, to inquire what lands &c. cannot put the partie out of poſſeſſion 78

Statute-Merchant, if good in regard no day of payment is limited, largely and learnedly argued by the Court 82 83 &c,

Servant taken away. See Treſpas.

T

TIthes. See Preſcription.

Treſpaſs, the Defendant ſaith, that *I.* S. was ſeiſed in right of his wife, and that ſhe died ſeiſed, and that he as heir &c. the Plantiff replied that ſhe died not ſeiſed, he ought to have ſaid that ſhe died not ſole ſeiſed 7

Treſpaſs in *Yorkſhire*, Juſtification in *Durham* without that that guiltie in *Yorkſhire*, good, becauſe it is local 7

A Traverſe to a preſentation where good and

and where not 13 14

Tenure where it is Traverſable and where the ſeiſin 18

Tithes not due of Cattle for the diarie 33.

Treſpaſs for Beaſts taken in London Juſtification upon a leaſe of land in *Kent*. Replied that the Defendant ſold them in London, no good plea to bring the trial out of *Kent* 48

Treſpaſs for taking ones ſervant, lieth not upon a private retainer, otherwiſe if it were at the Seſſions 51

Tithe giuen by the Pope to the Vicar, and the Copie of the *Bull* only was ſhewed in evidence not good 70

Tithes cannot be appurtenant to a Grange, except the Grange be the Gleab 72 73

Traverſe where good, and where not 113

U

Venire facias omitting part of the *venue* if good 34

Variance between the writ and Declaration where good 35

A feofment to the uſe of A. for life, and after to the uſe of his daughter till B. pay her 100. l. here the daughter hath no remedie for this 100. l. without a promiſe 71

A Ventre inſpiciendo awarded and returned, but the Court would not agree, that ſhe ſhould be detained from her ſecond husband, but attended by divers women till her deliverie 71

Variance between the *venire facias*, and the Sheriffs return, no judgement in that caſe 73

W

IN Waſte judgement by *nihil dicit*, and upon an inquirie, the jury found 8. s. damages, what judgement ſhall be giuen 5

Wager of Law upon a Bill of Exchange 24

Writs, a difference wherein there is an error in the original, and where in the judicial writ, that is amendable 73

Waſte although for a time it is puniſhable, yet after the action may reuive 79 86

Writ, againſt husband and wife as an Inheritrix, the husband dies, if the writ abate 102

Errata.

Errata.

PAge 1. line a. 27. for do read Doa p. 2. l. 4. r. *lieu* p. 4. l. 2. 22. r. 300. pa. 8. l. 36. r. *Hendon* and ſo throughout p. 12. in the Title r. *Duncombe* againſt the *Vniverſitie* of *Oxford* p. 12. l. 14. r. 38. H. 8. cap. 39. p. 14. in the Title r. Sir *George Savile* againſt *Thornton* p. 15. l. 21. r. *communication* p. 16. l. 12. r. 7. *Jac.* cap. 5. p. 17. l. 47. r. *Maines*, and l. 17. r. *ſic.* and alſo p. 17. & 18. in the Margent r. *Trin.* p. 21 l. 51. r. 39. *Eliz.* p. 23. l. 9. r. *till* p. 26 l. 28 for writ r. *Action*, and for Action r. *writ* p. 27. l. 12. for he r. *they* p. 28. l. 34. r. *may not* p. 29. in the Margent r. *Eaſter* p. 29. l. 33. for S. r. *N.* p. 33. l. *ultim.* r. *Moore* p. 36. l. 43. r. *Tittrels* p. 45. l. 20. r. *demandable* p. 50. l. 35. r. *Bar* p. 51. l. 22. r. *a penalty* p. 53. l. 16. r. *may not* p. 54. l. 44. r. *Eſtate* p. 57. l. 19. r. *in our caſe* p. 58. l. 50 r. 16. E. 4. p. 68. l. 5. r. *eſtray* p. 71. l. 26. r. 12. Note in p. 72. l. 7. *Wolſeys* caſe ought to have been printed by it ſelf p. 77. l. 4. r. *avoided* p. 88. l. 4. r. *Finch* p. 90. l. 15. r. *continuance* p. 100. l. 21. for preſervation r. *perſwaſion* and l. 34. for entire r. *entrie* p. 109. in the Margent for Trin. r. *Mich.* p. 112. l. 25. r. thought p. 114. l. 18. for intereſted r. *intereſt*.